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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 266.

P. O. COX, SAM. LEVY, AND W. M. EVANS, PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED MAY 16, 1905.

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(19,767.)

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INDEX.

	Original.	Print.
Proceedings in district court for Hamilton county	1	1
Caption	1	1
Plaintiff's first amended original petition	1	1
Defendants' first amended original answer	6	5
Plaintiff's second supplemental petition	9	7
Statement of facts	10	8
Application for license for the sale of liquor	10	8
Liquor dealer's bond	10	9
Certificate of clerk of Tarrant as to solvency of bond	12	10
Certificate of acknowledgment of county clerk Hamilton county	12	10
Certificate of record by county clerk of Hamilton county	12	10
Testimony of W. B. Thompson	13	11
W. W. Thompson	16	13
John T. Adams	25	20
J. E. Welch	31	24
T. S. McKinley	33	25
John May	34	26
J. A. Gamble	36	28
Statement of W. W. Thompson offered by defendants	38	29
Testimony of J. W. Newsome	38	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1906.

	Original.	Print.
Agreement of attorneys to statement of facts	29	30
Judge's approval of statement of facts	29	30
General charge of the court	29	31
Special instruction asked by defendants	43	34
Special instruction asked by defendants	44	34
Verdict and judgment	45	35
Defendants' motion for new trial	46	36
Order overruling motion for new trial, notice of appeal, and 20-day order within which to file statement of facts and bills of exceptions	48	38
Supersedeas bond	48	38
Assignments of error	50	39
Bill of costs	56	44
Clerk's certificate to transcript	58	46
Proceedings in court of civil appeals	59	46
Opinion	59	46
Judgment	60	47
Motion for rehearing	60	47
Order overruling motion for rehearing	67	52
Proceedings in supreme court of Texas	68	52
Application for writ of error	68	52
Judgment	83	63
Bill of costs	84	64
Further proceedings in court of civil appeals	85	64
Petition for writ of error	85	64
Assignments of error	100	75
Supersedeas bond	103	77
Bill of costs	106	79
Clerk's certificate	107	80
Writ of error (original)	108	80
Citation in error (original)	111	82
Acceptance of service of citation	112	82

Caption.

TATE OF TEXAS, *County of Hamilton:*

term of the District Court, begun and holden within and for unty of Hamilton, at Hamilton, on the 29th day of February, 1904, and which adjourned on the 25th day of March, A. D. the Hon. N. R. Lindsey, Judge thereof, presiding, the follow- use came on for trial, to-wit:—

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

Plaintiff's 1st Amended Original Petition.

Filed Feb'ry 29", 1904.

Honorable District Court of Hamilton County, Texas, Feb'ry Term, A. D. 1904.

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

e Honorable Judge of said Court:

nes now the State of Texas plaintiff herein, leave of the Court eing had and obtained, and files this its First Original nded Petition in lieu of its Original Petition filed in said cause e 10" day of June, 1902, and for amendment says:—

That the defendant P. O. Cox, at the time of the transactions nafter complained of and at the time of the filing of plain- original petition, was a resident citizen of the County of Hamil- nd State of Texas and was at that time and in fact is now en- in the business of a retail liquor dealer in the city of Hico, in County and State; that the defendant Sam Levy, and W. M. s, were and are now resident citizens of the County of Tarrant, State aforesaid.

And for cause of action herein the plaintiff would show to the , that heretofore to wit, on or about the 22" day of May, 1902, efendant, P. O. Cox, under the firm name of P. O. Cox & Co. application for and procured from the Tax Collector of Hamil- ton County, Texas, State and County license to engage in the business of a Retail Liquor Dealer in the city of Hico, in said County and State, and in the place known as the J. A. Gamble

saloon building, situated on a part of lots Nos. 11 and 12, in Block No. 3, Division 1, therein.

That said license was procured for the purpose of engaging in the business of retailing spirituous, vinous and malt liquors and medicated bitters capable of producing intoxication.

That on or about the last said named date and in connection with the procurement of said State and County license, and for the purpose of being able to pursue said occupation, and as is required by law, the defendant, in his own name as principle, made, executed and delivered for record a bond in the sum of five thousand dollars payable to the State of Texas, as required by law, with the defendants, Sam Levy, and W. M. Evans as sureties on said bond, which said bond was duly and legally received and approved by J. C. Main, County Judge of Hamilton County, on the 22nd day of May, 1902.

That under and by virtue of said bond and license the defendant, P. O. Cox, was authorized and in fact had been and was at the time of the transactions herein complained of doing business under the same as a Retail Liquor Dealer, engaged in the business of selling and retailing spirituous, vinous and malt liquors and medicated bitters capable of producing intoxication as hereinbefore alleged, in the city of Hico, in said County and State.

That said bond is conditioned among other things, that the said P. O. Cox & Co., their agent or employé would not sell nor permit to be sold in their house or place of business, nor give nor permit to be given, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication to any person under the age of twenty one years, and that they will not permit any person under the age of twenty one years to enter and remain in such house or place of business which said bond was duly signed by all the defendants and filed for record in the County Clerk's office of said Hamilton County, on the 22nd day of May, 1902, and which said bond in words and figures is substantially as follows, to wit:—

THE STATE OF TEXAS, *County of Hamilton:*

3 Whereas, P. O. Cox & Co. desires to engage in the sale of spirituous, vinous or malt liquors and medicated bitters, capable of producing intoxication, to be drunk on the premises in quantities of one gallon or less at —— in the town of Hico, in the County of Hamilton State of Texas, and have made the application and paid the taxes required by law.

Therefore, know all men by these presents, that we, P. O. Cox & Co. as principle, and Sam Levy and W. M. Evans as sureties, are held and firmly bound unto the State of Texas in the sum of five thousand dollars, for the payment of which we bind ourselves, our heirs and legal representatives, jointly and severally; Conditioned, that the said P. O. Cox and Co., principal, shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous or malt liquors and medicated bitters, capable of producing intoxication, and that they or their agent or employé, will not sell nor permit to be sold in their house or place of business, nor give nor permit to be

ven any spirituous, vinous or malt liquors and medicated bitters, pable of producing intoxication to any person under the age of enty one years, or to a student of any institution of learning, or any habitual drunkard, or to any person after having been noti- d in writing through the Sheriff or other peace officer, by the fe, mother, daughter or sister, of the person, not to sell to such rson; and that they will not permit any person under the age of enty one years to enter and remain in such house or place of busi- ss; and that they will not permit any games prohibited by the ws of this State to be played, dealt or exhibited in or about such use or place of business; and that they will not rent or let any rt of the house or place in which they have undertaken to sell irituous, vinous or malt liquors and medicated bitters, capable of roducing intoxication, to be drunk on the premises, on any quan- ty, to any person or persons, for the purpose of running or con- ucting and game or games prohibited by the laws of this State; and at they will not adulterate the liquors sold by them in any manner y mixing with the same any drug; and that they will not know- ingly sell or give away any impure, or adulterated liquors of any kind; then this obligation to be null and void, otherwise to remain in full force and effect.

Witness our hands, this 21st day of May, 1902.

(Signed) P. O. COX.
SAM LEVY.
W. M. EVANS.

THE STATE OF TEXAS, *County of Tarrant:*

I, W. E. Butler, Clerk of the County Court in and for said County of Tarrant, do hereby certify that Sam Levy, & W. M. Evans whose names appear signed to the annexed bond are in my opinion good and ample security for the amounts therein specified. That Sam Levy, and W. M. Evans have property in said County subject to execution of a larger amount, and that if said bond was offered me for approval, the same would be accepted and approved.

To certify which, I hereunto set my hand and impress of my official seal, at office in the city of Fort Worth, Texas, on this the 21" day of May, A. D. 1902.

[SEAL.] (Signed) W. E. BUTLER,
Clerk of the County Court, Tarrant County, Texas.
By WALTER G. KING, *Deputy.*

THE STATE OF TEXAS, *County of Hamilton:*

Before me, F. C. Williams, Clerk of the County Court in and for said County and State on this day personally appeared P. O. Cox, known to me to be the person whose name is subscribed to the fore- going instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 22" day of May, A. D. 1902.

(Signed) F. C. WILLIAMS,
Co. Clerk, Hamilton County, Texas.

Examined and Approved May 22nd 1902.

[SEAL.] (Signed) J. C. MAIN,
Co. Judge, Hamilton Co., Texas.

Filed for record May 22nd 1902.

(Signed) F. C. WILLIAMS,
C. C. C. H. C. T.

3. Plaintiff would further show to the court, that heretofore, to wit, on or about the 30th day of May, 1902, after the procuring of a license by the defendant, P. O. Cox, and the execution and filing of the bond as aforesaid, and while the defendant was doing business thereunder, one Wm. W. Thompson, a person under the age of twenty one years, without the knowledge or consent of anyone authorized to give same, and upon six different, distinct and separate occasions, entered into the defendant P. O. Cox's house and place of business in the place known as the J. A. Gamble saloon building, hereinbefore designated in the city of Hico, in said County and State, and upon each of said six occasions remained in the said house and place of business, and was allowed by the defendant P. O. Cox, his agents and employés, to so enter and remain in said house and place of business to plaintiff's damage in the sum of three thousand dollars, which said house and place of business was then and there devoted to the sale of spirituous, vinous and malt liquors and medicated bitters capable of producing intoxication, contrary to the law and defendant's undertaking in his said bond.

4. Plaintiff would further show to the court that the said minor, Wm. W. Thompson, who was then and there allowed to enter and remain in defendant's place of business and while so remaining therein, on each of said six occasions was sold and given and permitted to be sold and given by P. O. Cox, his agents and employes, spirituous, vinous and malt liquors and medicated bitters to plaintiff's damage in the further sum of three thousand dollars.

5. Premises considered the defendants having appeared and answered herein, plaintiff prays that upon a final hearing hereof, that for the minor Wm. W. Thompson entering and remaining in the house and place of business of P. O. Cox, a place devoted to the sale of spirituous, malt and vinous liquors and medicated bitters capable of producing intoxication and the sale of the spirituous, vinous and malt liquors and intoxicating beverage under license and bond, it have judgment against the said P. O. Cox as principal, and the sureties upon his bond, Sam Levy, and W. M. Evans, liquidated damages in the sum of five hundred dollars for each infraction of the bond herein alleged and pleaded, and in the aggregate in the sum of three thousand dollars; and that for the sale and gift of spirituous, vinous and malt liquors to said minor, that it have judgment against the defendant P. O. Cox, as principal, and the sureties on his bond, Sam Levy, and W. M. Evans, liquidated damages in the sum of five hundred dollars for each infraction of said bond herein alleged and pleaded as to sale and gift; and that it have judgment upon the twelve counts and violations of said bond,

herein pleaded, liquidated damages, in the sum total of six thousand dollars, together with all costs of suit in this behalf expended and for such other further general and special relief as to the Court may seem equitable and proper in the premises.

H. E. CHESLEY,
Attorney for the Plaintiff.

No. 1336. The State of Texas *vs.* P. O. Cox *et al.* Suit upon Liquor Dealer's Bond. Plaintiff's 1st Amended Original Petition. Filed Feby. 29th 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

Defendant's 1st Amended Original Answer.

Filed Mch. 3d, 1904.

In the District Court of Hamilton County, Texas. February Term 1904

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

Now comes the defendants herein by attorney, and under leave of the Court file this defendant's First Amended Original Answer, in lieu of and to take the place of defendant's Original Answer filed herein on, to wit, the 25th day of August 1902, and for amendment say an- allege.

First. Defendant's demur to plaintiff's petition, and say the same shows no cause of action against them, and of this they pray judgment *and* etc.

D. LANGFORD,
Att'y for Defendants.

Second. And for special exception defendants say that plaintiff's petition is insufficient in law because the alleged liquor
7 dealer's bond upon which this suit is predicated fails to show on what lot, block or street in the town of Hico, the said business of liquor dealer was to be carried on, nor is the house where the same was located or to be located described or in any manner identified. Wherefore defendants say that said petition is insufficient in law, and of this they pray judgment, *and* etc.

D. LANGFORD,
Att'y for Defendants.

Third. Now come the defendants herein and demur to plaintiff's petition filed herein, and say the same is insufficient in law, because that part of the act of the legislature under which this suit is brought

regulating the sales of liquor and prescribing the tax and penalty is unconstitutional, construed in connection with Art. 5060½ of said act; in that said Art. exempts from the provision of the statute people engaged in the same business, to wit, the sale of vinous and intoxicating liquors, provided they sell wine produced from grapes grown in the State, by the seller. And of this defendants pray judgment *and* etc.

D. LANGFORD,
Att'y for Defendants.

Fourth. Without waiving the foregoing exceptions or either of them, defendants deny all and singular the allegations in plaintiff's said petition contained and of this they put themselves on the County *and* etc.

D. LANGFORD,
Att'y for Defendants.

Fifth. And for further answer defendants say that if P. O. Cox his agents or employés ever sold, or gave, or permitted to be sold or given any intoxicating liquor to W. W. Thompson, he being a minor on or about the date alleged, which is not admitted but denied that the same was sold and given to said Thompson in good faith with the belief and having good grounds for said belief, that said W. W. Thompson was twenty one years of age, and this they are ready to verify.

D. LANGFORD,
Att'y for Defendants.

8 Sixth. And for further answer herein Defendants aver that if W. W. Thompson, being a minor, ever entered and remained and was permitted to enter and remain in the saloon of P. O. Cox, by the said P. O. Cox, his agents and employés as alleged in plaintiff's petition, which is not admitted, but denied, that said W. W. Thompson so entered and remained in the place of business and saloon of said P. O. Cox, for the purpose of procuring intoxicants, the said P. O. Cox, his agents and employés believing and having good grounds to believe that said W. W. Thompson was twenty-one years of age. And the said W. W. Thompson so entered and remained, if at all, no longer that was reasonably necessary to procure said intoxicants which were sold and given to him by said P. O. Cox, his agents and employés, in good faith, believing and having good grounds to believe that said W. W. Thompson was above the age of twenty one years. And defendants aver that the alleged entering and remaining of the said W. W. Thompson and the permission by the said P. O. Cox, his agents and employés for said W. W. Thompson to enter and remain in the saloon of P. O. Cox was but a necessary incident, and part of sales of intoxicants to said W. W. Thompson by the said P. O. Cox his agents and employés made in good faith believing and having good grounds to believe that said W. W. Thompson was twenty one years of age, and this they are ready to verify.

D. LANGFORD,
Att'y for Defendants.

Seventh. And for further answer herein defendants say that if W. W. Thompson, ever entered and remained in the saloon of P. O. Cox & Co. that the same was for the purpose of procuring intoxicants which were sold and given to him in good faith, with the belief that he was above the age of twenty one years, and after and before intoxicants were sold and given to said W. W. Thompson, he did not and was not permitted to tarry or loiter in said saloon. And this they are ready to verify.

D. LANGFORD,
Att'y for Defendants.

No. 1336. The State of Texas *vs.* P. O. Cox *et al.* Defendant's 1st Amended Original Answer. Filed Mch. 3d, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

9 *Plaintiff's 2nd Supplemental Petition.*

Filed Mch. 22", 1904.

In District Court of Hamilton County, Texas, Feb. Term, 1904.

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

To Hon. N. R. Lindsey, Judge of said Court:

Now comes the plaintiff and files this his second supplemental petition, leave of the Court having been first had and obtained, and replying to the defendants' First Amended Original Answer, says and alleges as follows:—

First. Plaintiff demurs generally to the defendants' said answer and says same is insufficient in law and affords no defense to the cause of action pleaded by the plaintiff and of this he prays judgment of the Court.

MAIN & CHESLEY,
Attorneys for the Plaintiff.

Second. Plaintiff specially excepts to paragraph No. 6 of the defendants' answer and says that same is insufficient in law in this: That a belief based upon good ground, that W. W. Thompson, was of age at the date of the alleged entry and remaining would not constitute a defense to the charge in plaintiff"s petition for permitting the minor to enter and remain in such place of business, and this though the entering and remaining may have been but an incident to and a part of sales of intoxicants made to the minor and because the only defense available to said charge is set up in paragraph 7, of said answer. Wherefore, plaintiff prays that all of said paragraph No. 6, be stricken out.

MAIN & CHESLEY,
Attorneys for the Plaintiff.

Third. Further replying to said answer the plaintiff denies all and singular the allegation in the defendants' answer contained and of this he puts himself upon the County and prays judgment of the Court.

MAIN & CHESLEY,
Attorneys for the Plaintiff.

No. 1336. The State of Texas *vs.* P. O. Cox *et al.* Plaintiff's Supplemental Petition Filed 22" day of Mch. 1904. R. C. Cornelius, Clerk Dist. Court Hamilton Co. Texas.

10 *Statement of Facts.*

Filed Apr. 12th, 1904.

In the District Court, Hamilton County, Texas, February Term, A. D. 1904.

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

Be it remembered that on the trial of the above numbered and entitled cause in the District Court of Hamilton County Texas the following evidence was introduced and none other to wit:—

The plaintiff offered and read in evidence the following application for license and the following bond, to wit:—

Application for License for the Sale of Liquor.

Application for License for the Sale of Spirituous, Vinous or Malt Liquors or Medicated Bitters.

THE STATE OF TEXAS, *County of Hamilton:*

We the undersigned hereby make application for license for the sale of spirituous, vinous or malt liquors or medicated bitters in quantities of one gallon or less to be drunk on the premises; and having been duly sworn declare that on the 24th day of May 1902, we intend to engage in the sale of such liquors, in the quantities and in the manner above applied for, at J. A. Gamble building, in the town of Hico County of Hamilton, and parts of Lots No. 11 and 12 in Block No. 3 Division one.

(Signed) P. O. COX.

Sworn to before me this 22" day of May 1902.

[SEAL.] F. C. WILLIAMS,
Co. Clerk, Hamilton Co., Tex.,
By J. T. DEMPSTER,
Deputy.

Liquor Dealer's Bond.

THE STATE OF TEXAS, *County of Hamilton:*

Whereas, P. O. Cox & Co. desires to engage in the sale of spirituous vinous or malt liquors, and medicated bitters capable of producing intoxication, to be drunk on the premises, in quantities of one gallon or less at ——, in the town of Hico, in the
11 County of Hamilton State of Texas, and has made the application and paid the taxes required by law.

Therefore, Know all Men by these Presents, That we P. O. Cox & Co., as principal, and Sam Levy and W. M. Evans as sureties, are held and firmly bound unto the State of Texas in the sum of five thousand dollars, for the payment of which we bind ourselves, our heirs and legal representatives, jointly and severally: Conditioned, That the said P. O. Cox & Co. principal, shal- keep an open, quiet, and orderly house or place for the sale of spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication; and that they or their agent or employé, will not sell nor permit to be sold in their house, or place of business, nor give nor permit to be given any spirituous, vinous, or malt liquors, and medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, daughter, or sister of the person, not to sell to such person; and that they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that they will not permit any games prohibited by the laws of this State to be played, dealt, or exhibited in or about such house or place of business; and that they will not rent or let any part of the house or place in which they have undertaken to sell spirituous, vinous, or malt liquors and medicated bitters capable of producing intoxication in any quantity to be drunk on the premises, to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this State; and that they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug; and that they will not knowingly sell or give away any impure or adulterated liquors of any kind; then this obligation to be null and void, otherwise to remain in full force and effect.

Witness our hands, this 21st day of May, 1892.

P. O. COX.
SAM LEVY.
W. M. EVANS.

12 Examined and approved May 22nd 1902.

J. C. MAIN,
Co. Judge, Hamilton Co., Texas.

Certificate of the Clk of Terrant Co. as to Solvency of Bond.

THE STATE OF TEXAS, *County of Tarrant:*

I, W. E. Butler, Clerk of County Court in and for said County of Terrant, do hereby certify that Sam Levy and W. M. Evans, whose names appear signed to the annexed bond are in my opinion good and ample security for the amounts therein specified. That Sam Levy and W. M. Evans have property in said County subject to execution of a large amount, and that if said bond was offered me for approval, the same would be accepted and approved.

To certify which, I hereunto set my hand and impress of my official seal, at office in the city of Fort Worth, Texas, on this the 21st day of May, A. D. 1902.

(Signed) W. E. BUTLER,
[SEAL.] *Clerk of County Court, Tarrant County, Texas.*
By WALTER G. KING, *Deputy.*

Certificate of Record, Clk Co. Court, Hamilton Co., Tex.

THE STATE OF TEXAS, *County of Hamilton:*

Before me F. C. Williams, Clerk of the County Court in and for said County and State on this day personally appeared P. O. Cox, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 22 day of May A. D. 1902.

[SEAL.] F. C. WILLIAMS,
Co. Clerk, Hamilton County, Texas.

Filed for record, May 22–1902.

F. C. WILLIAMS,
C. C. C. H. Ct.

Certificate of Record, Clk Co. Court, Hamilton Co., Texas.

THE STATE OF TEXAS, *County of Hamilton:*

I, F. C. Williams, Clerk of the County Court in and for said County, do hereby certify that the foregoing instrument of
13 writing dated the 21st day of May A. D. 1902, with its certificate of Authentication, was filed for record in my office, on the 22" day of May, A. D. 1902, at 2 o'clock, P. M. in the Bond Records of said County in Book "1" on page 24.

Given under my hand and seal of office, at Hamilton the day and year last above written.

[SEAL.] F. C. WILLIAMS,
Clerk County Court, Hamilton County, Texas.
By J. T. DEMPSTER, *Deputy.*

Testimony of W. B. Thompson.

W. B. THOMPSON, a witness for plaintiff, duly sworn, testified:—
My name is W. B. Thompson. I live in Erath County Texas about nine miles North of Hico Texas. I have been in the County for about twenty seven years. I am the plaintiff in the suit cause #1335, W. B. Thompson *vs.* P. O. Cox *et al.* I am the father of W. W. Thompson. On the morning of May 30" 1902, my son W. W. Thompson left home stating that he was going to Hico. At that time he was about eighteen years and six months old. He was born November 30" 1883. I never did give my consent to P. O. Cox or any of his agents or employees to sell or give my son W. W. Thompson liquor. I did not know there was any such a man as P. O. Cox. I never did give my consent to P. O. Cox or any of his employees or agents to sell or give my son W. W. Thompson any drink of any kind,—or any one else. I never gave my consent to P. O. Cox or any of his agents or employees to permit my son W. W. Thompson to enter and remain in his place of business.

Cross-examined by DEFENDANT:

I have lived in Erath County for about twenty seven years. My son W. W. Thompson, was born on November 30" *1903*,—that is what the record shows. Yes it was on May 30" 1902 that he left with the statement that he was going to Hico. I remember it was the 30" of May because I went to Hico the next day myself and Mr. Connolly saw me there and asked me how old the boy was and I told him I did not think he was eighteen years old then and then he told me what had happened, and after I went home we talked about it and I remember it was the 30", because I have a clock at
14 home that tells the day of the month, and I looked at it. The boy left the house that morning pretty early,—I suppose the sun was about an hour or an hour and a half high,—it was tolerable soon after breakfast. I did not *send* him go to Hico,—I did not know anything about it until he started, and he then said he was going to Hico to get him a saddle. He was staying at my house then. I do not remember how long at that time he had been staying at my house then. He had worked there a few days and if I did not have anything for him to do he would go somewhere else and work. Prior to that he had worked some for my son in law. When I did not have anything for him to do he went where he pleased and hired to whom he pleased. He never asked me about who he should hire to. He would often tell me that he was going to work for such and such a person. Sometimes he might ask me and sometimes he might not,—if I did not have anything particular for him to do he wouldn't. When he worked for other people I never had anything to do with his wages,—he always kept the money himself. On the morning of May 30" 1902., I heard him at the breakfast table or soon after say that he was going to Hico,—he said he was going to Hico to get him a saddle. I was out about the lot when he left that morning. Yes I testified in a former trial of

this case. I only know where he went by what he said.—he said he was going to Hico, and I never saw him any more that day. No I did not ever give my consent for him to go into Cox's saloon,—I did not know Cox had a saloon. No I did not know at — time that there were saloons in Hico,—I was there some time before that and some one told me that they were going to put in saloons again there. The next time after the boy went to town that I saw him was the next morning about nine o'clock. I had started to Hico and I met him about three miles this side of my house,—he went on home and I came on to town. My son is living with me now,—he has been there off and on ever since the last trial in this suit. He has worked a little away from home since then. He has been at home about three fourths of the time since then. He worked for Mr. Salmon, his brother in law some, and he picked cotton for several people there in the community,—sometimes a day or two and sometimes as much as a week, and sometimes I did not know where he was. Prior to May 30" 1902., I had seen empty bottles lying around the buggy shed and while I did not absolutely know it, yet I was satisfied that the boy had been getting whiskey somewhere. Yes I have talked to him about it. I just asked him who put them bottles there, and sometimes he would say he did not know, and sometimes when I would ask him where he got the whiskey he would say "well I got it all the same." I asked several boys around there and they said they did not know anything about him drinking whiskey,—that they never got him any or saw him get any. I had been finding bottles for a year or so back prior to May 30" 1902,—I would find half pint bottles and sometimes pint bottles. I had another boy older than this one, but he never got any whiskey. I never found very many bottles,—when he would go off to town and come back I would find the bottles. Yes in February 1901 he brought some whiskey to the house that I had sent him for, —that was the time we had the measles there and I sent him to town to get some whiskey. I told him to go to Bill Dawson. I told him I wanted him to go to town that day and get half a gallon of good whiskey. I told him to go to Bill Dawson and get half a gallon of good whiskey, and told him while he was getting his horse ready I would write an order for it, and he said 'I can get the whiskey without any order,—I do not want any order," and he went and got his horse and went off without the order. I told him Dawson would not let him have it, and tried to get him to take the order because I did not think he could get the whiskey without it, and I did not want him to ride up there and back for nothing. He went off without the order anyhow. I would have gone myself but I was not well enough. Yes I told him to go to Bill Dawson, and I knew Bill Dawson was a saloon keeper. The reason I wanted to send the order was that I knew it was against the law to sell minors whiskey.

Re-examined by the PLAINTIFF:

Bill Dawson lived at Stephenville,—he did not live at Hico. That is the only time I ever sent the boy after whiskey. Yes my family was sick with the measles then.

16 Cross-examined by DEFENDANT:

I did not send him to a saloon,—I told him to go to Bill Dawson and tell him to send me the whiskey. Yes I knew he would have to go into a saloon to get it,—but I have went to saloons many times and got whiskey and never went in the house. I did not study much about whether he would have to go in and get it or would get it from the outside. I just told him to go to Bill Dawson and get the whiskey,—I wanted him to take the order to get it,—I had no idea that he would bring back the whiskey because he did not take the order. Yes I permitted him to ride up there which was twelve miles without the order.

Testimony of W. W. Thompson.

W. W. THOMPSON, a witness for plaintiff, being duly sworn, testified:—

I am a son of W. B. Thompson. I am now past twenty years old. I will be twenty one years old the 20th day of this coming November. I know the year I was born. I was born in 1884. Yes I believe it was 1884. Yes I am certain of that. I am twenty past,—I will be twenty one the 20th of this coming November. In 1902 I was eighteen past. I know P. O. Cox. I do not know where he is now. I knew him when he lived at Hico. He run a saloon there, yes I have been in his place of business. I was there on May 30th 1902. I was in there several times that day. I was in there some six or eight times that I remember of being in there. I purchased whiskey and beer while I was in there. I paid for it. I remember the first time I was in there that day. The first time I was in there that day another fellow named McFadden went in with me and we bought two toddies. We paid 10c. each for them. I paid for them. I drank mine. That fellow May was the bar tender. The toddies were made out of whiskey. No one objected to my coming in there. No one asked me to leave. The first time I stayed in there some ten or fifteen minutes,—maybe twenty minutes. Fifteen minutes anyhow. I talked around in there a while,—there were a lot of fellows sitting in there on beer kegs and I talked to them. After we drank the whiskey we stayed around in there
17 awhile and then drank a small bottle of beer apiece, before going out. Then we went out and knocked around town awhile and then went back in the saloon. The same fellow was with me the second time that was with me the first time. I think that fellow is in California now. The second time we were in there we bought beer, I think it was keg beer,—I know it was. I paid a nickel a glass for it. Mr. Cox waited on us that time. Mays waited on us the first time. I do not know exactly the time we stayed in there that time,—about five minutes. We stayed in there some five minutes—maybe ten. This time we had to wait a right smart little bit before they got our drinks ready,—there were a whole lot of men in there and they had to be waited on. I think we went out that time immediately after we drank. We went to the laundry. I was back in there after that again. I reckon we were gone down to

the laundry about half an hour before we went back into the saloon. Yes this same man went back in there with me the third time. I bought beer when I went in there. I paid a nickle a glass for it. This time I stayed in there about an hour I reckon. I stood up some and set down some. There was no one that time presented a written order to me to sign. I think after that they did,—I do not remember very much about the statement. The reason I do not remember about the statement much is that I was drunk. I do not know the number of times I drank before the statement was secured. I do not remember having a conversation with Mr. Cox that day until he came around with that paper,—I would not sign it until I got too drunk and then he got me to sign it then. I never signed it when he first brought it to me. While I was in there that half hour I drank as many as half a dozen times. After I went out this time I think I went back again. I bought a saddle that day. I do not remember of starting home. I bought a couple or three bottles of beer before I left some time and put it in my saddle pockets. I did that a right smart while before I started home. I do not know what I did with that bottled beer. I do not remember what time of the day it was when I left for home. I got home next day about twelve o'clock. I stayed on the road part of the night, and I stayed the rest of the night at my sister's house. She
18 lived about four miles from my father's place,—on this side. I do not remember how long I had been in the saloon at the time they got me to sign that statement. I had been drinking all along before I signed the statement. The first thing that was said about age, Mays, the bar tender, says "are you boys twenty one years old," and we told him "we reckoned we were," and there was nothing else said about it at all until Cox come around with that paper. Cox never did ask us if we were twenty one years old. He brought the paper around to me and said some men were cutting up out there on the outside about it, and said if I would sign that paper it would save him. Up to the time I took the bottle-beer out and put it in my saddle pockets I had been in the saloon three of four times,—maybe more,—I would not be positive about it.

Cross-examined by the DEFENDANTS:

Yes I say I was born in 1884. Yes I think that is my birth year. Before this day I had seen P. O. Cox there around Hico a time or two. I had not been in his saloon before that day. No I do not think I had taken whiskey home often and left bottles lying around my father's premises. Yes I might have left bottles around there,—I do not know as I left anything around the place. Yes I have carried whiskey home. I did not leave bottles laying around the premises,—my father sent me to Stephenville once after some whiskey. I do not know as I ever left bottles that I had used the whiskey out of laying around my father's premises. No I had never left any empty bottles about the stables or lying around where my father could find them. My father has got after me a time or two about drinking whiskey. I do not know that he had

found any bottles I had laid around. I do not know as I left any bottles lying around the premises. This morning I left for Hico. I left home between nine and ten o'clock and went straight on to Hico. It was about eight and a half or nine miles to Hico. It took me about an hour and a half to make the trip. When I got to Hico I knocked around over town until I met up with McFadden. He was a man that used to live up close to Clairette—I think he is in California now,—I am not for certain about that. He left this country last September I met him along about
19 Stovall's building somewhere. I do not know how we come to go to the saloon,—we just walked up there. I do not remember which one of us proposed going up there. We did go up to the saloon, and both went in at the same time. I did not state anything to him about me not being twenty one years old. The bar tender asked us if we were twenty one years old, and we told him we reckoned we were. Yes I remember swearing here on a former trial of this case. Q. Do you remember stating that it was about eleven o'clock when you went in there and 'the bar tender when we walked up asked us if we were twenty one years old, and we told him we were. I told him I was twenty one years old.' Did you state that? A. I made some statement about it. Q. You did tell him you were twenty one years old didn't you? A. We told him we reckoned we were twenty one. I told him I reckoned I was twenty one. Q. Did you not testify directly before that you told him you were twenty one years old? A. I do not know. Q. Do you remember? A. I do not remember much about it. Q. Did you tell him or not that you were twenty one years old? A. I never told him for certain that I was twenty one. I told him I reckoned I was twenty one. That was all there was said, and I never paid much attention to it. McFadden did not say anything about it. The bar tender just says 'are you boys twenty one years old,' and we both spoke at the same time and said we reckoned we were. That was about all that was said about it. There was nothing else that I remember of said about it. No I was not then twenty one years old. I do not know as I had been in other saloons and told them I was twenty one years old. I do not know as I have told other bar tenders that I was twenty one years old. I did not tell any other bar tenders I was twenty one years old. It did not take any time at all when the bar tender was asking about our age. Yes there were others in the saloon at the time. I do not think there was any one else buying drinks right where we were,—there were some down towards where Mr. Cox was at the far end, and he was opening a keg of beer. Yes he could see us. I took a toddy. It does not take very long to fix the toddy. Yes he had to get out the glasses and fix it,—I guess it took him about a minute to do that,—I was not timing him. Yes he had to get the glasses
20 and water and set out the bottles with the whiskey in it. Then we drank the toddies and paid him. I do not remember whether I paid him the exact change, or whether he had to make change for us. I paid him ten cents each for the drinks. I do not know that they were selling such drinks at a bit, or two *of* a

quarter,—they sold them to me at ten cents each. After we drank the whiskey we stayed around in there a little bit. We stayed in there some ten or fifteen minutes. No I can't tell how much time was taken up in getting the drinks ready, and drinking them, and making the change and paying for the drinks,—just a short time though. I do not know that I testified on a former trial of this case that I paid for the drinks, the price was ten cents,—I paid twenty cents for both, and then we went out and knocked around,—that we immediately went out,—I do not remember that. No I will not say that I did not testify that way. I did not go immediately out after that. When we first went in we taken a drink a piece,—I did not drink any more right then—we stayed there in the saloon a little bit and then took some more. We were there in the saloon talking, to first one and then another. I think Tom Lane was one of the parties in there. I think we stood up around in there. I do not remember whether or not there were chairs in the saloon. We stood on the floor to do our talking. We were back some two or three steps from the counter. I do not know what the bar tender was doing while we were doing this. I do not know whether he saw us or not after we left the bar. He seen us when we come back up to the bar. He could have seen us there while we were away from the bar. No I could not swear that he saw us while we were away from the bar. There were several in there talking at the time. I reckon there was a dozen persons in the room at the time besides me and McFadden. I do not believe I can remember the names of any of them except Tom Laney,—I had seen all of them before, but I did not know the-re names. The first time I was in the saloon I took one drink of whiskey when I first went in and then I took a drink of beer before I went out. I did not testify on the former trial that I only drank the whiskey and went out. I did not testify to any such thing. I testified then that I took two drinks the
21 first time. Yes the whole time I was in there was not over about fifteen minutes. After we took the second drink we knocked around town for a little while,—I do not remember every place we went to. We went around by Stovall's building and then around by Phillip's. There we looked at some saddles. I did not buy one then. After we left there we went back to the saloon. We did not go to the laundry that time. It was after I went in the saloon the second time that I went to the laundry. I do not remember whether it was I or McFadden that proposed going back to the saloon. One wanted to go about as bad as the other. I do not remember what all was said when we started back the second time. I did all the paying for the drinks,—he did not have any money. We went in the saloon through the main door on the street. The second time we went in at the main front door,—the same one we went in the first time. I do not remember who we met in there that time. When we went in there the second time Mr. Cox was waiting on the bar. When we went in there that time it was somewhere about noon,—I do not know the exact time. I had not eat dinner then,—we did not eat dinner that day. When I first saw Cox he was opening up a keg of beer. The second time we went in there

he was behind the bar and got the beer for us. When we went in we told him we wanted a couple of beers, and he set them out to us and there was no more said. I paid for the beer. I do not know as I walked right straight out,—we stayed in there some little bit. I do not know what we were doing in there. Yes I know I stayed in there,—I know we stayed in there a little bit,—we never stayed in long the second time. We were just standing around in there,—just like you or any one else would be. I do not remember who all was there at that time. Yes there were other- besides me and McFadden there, but I don't remember who they were. The bartender, Mays, was also in there,—he was waiting on some of the rest of them. He was behind the bar. They were both waiting on the bar then,—Mays and Cox. When we went in the first time Cox was not waiting on the bar,—he was opening up a keg of beer, and Mays was waiting on the bar. I am not for certain whether Cox spoke to me or not. I would say approximately that I stayed in there the second time about five minutes. I was not timing
22 myself. Yes Cox had to draw the beer,—that takes some time of course, but mighty little. Yes he drew this beer from a faucet. I do not know how long it took him to do that,—No it did not take him as much at two minutes. I guess it would take about a minute to do that. No, not a minute to each glass,—a minute to draw both of them. Yes Cox was a one armed man, but he could carry two glasses in one hand. I could not swear that he could draw the two glasses of beer in one minute and I could not swear that he couldn't,—it took him a very little time to do it though. Yes after we drank the beer I had to pay for it. I do not remember whether I had the exact change, or whether Cox had to make change for me. Yes if he had to turn around and make change that would take a little time. I do not remember as to the matter of change. We went out that time at the front door, and went to the laundry. The laundry is down close to Weiser's mill,—South of where we were,—I guess is was about 350 or 400 yards from the saloon. I do not remember who was running the laundry at that time By this time I was getting a little drunk. Yes I say that I was in the saloon the second time about five minutes. I do not know the exact time we got back to the saloon the next time. I do not remember very much along after the second time I was in the saloon,—no, the third time. Yes it was after I went to the laundry. We stayed at the laundry just a short time,—two or three or four minutes. I just went to get some laundry and pay for it and then I came back. By this time I was becoming intoxicated. I can remember everything very well when I was at the laundry, but still I was tolerable boozy. From the laundry we went back up to the saloon,—yes to Cox's saloon. Yes McFadden was with me. We went into the saloon through the front door. Cox and Mays were in there when we went in. They were behind the bar. I do not remember which one was at the front part of the bar. When we went in there we drank some more beer. We called for it and they set it out, and we drank it and paid for it. I called for it, and I guess I paid for it. I reckon Cox waited on us that time. I do not know for certain,—

seems to me though that he did. Yes I know we took beer,—
23 keg beer. I do not remember which one of them drew the beer. I do not remember what was said. I do not know that there was anything said,—nothing more than we called for what we wanted and they set it out, and we drank it. No we did not leave then, we stayed there a good while. We sit down and stood up both, until we got to where I did not know what I was doing,—I got that way before I left that time. I do not know much about what took place after I got that way. There were a lot of beer kegs about the middle of the house, up next to the wall, and we set down on them some. I did know at the time who drew the beer, but I have forgotten. The other boy sit down also and there was some other men sitting down too. I remember that Charley Dasher and a man named Houck was there. I think we talked to them a little,—I am not for certain. We drank in there several times before we left. No I do not remember how many times we did drink before we left that time. I would say about four times. No I do not remember of getting up from the beer keg where I was sitting and coming up to the counter and calling for the drinks,—I remember it for awhile, but I soon got past remembering. We took the drinks sorter along like. I do not know whether we went back and sit down on the kegs after we took the drinks or not. When we were sitting on the kegs, Cox and the bar tender were over behind the bar. I suppose they were waiting on other customers,—I never paid much attention to them. I do not know whether they paid much attention to us or not. I do not know as they said anything to me. It was sometime along about that time that Cox brought that paper around there. It was while I was in there that time that I think the paper was first brought to me. I do not know when I signed that paper. Yes I testified before about it. No I did not then say that I knew when I signed it,—I said that I did not know. No I did not say then that I knew everything when I signed it. No I did not say that on the other trial,—for I did not know everything when I signed it. I was there in the saloon when Cox first come to me with that paper,—I do not remember exactly where in the saloon I was. I do not remember whether I was sitting on a keg or not. I was there somewhere about the middle of the saloon as I now remember. I do not know whether I signed
24 it on a desk or on top of a beer keg. Cox told me he wanted me to sign the paper, and said some of them were out there in front cutting up about it, and that it would save him, and I told him I would not sign it and I never signed it then. I was pretty far along when he brought the paper to me, but I remember telling him the first time that I would not sign it. I do not know what the statement was,—I did not read the paper. Cox did not read it to me. No I did not read anything. He wanted me to sign it and I would not. No I did not know at the time I signed it that I was signing it. The reason I did not want to sign it was because I did not know what it was,—I did not know much about it. I do not know where I went to sign it. Cox first came to me with it when I was somewhere near the middle of the saloon, but I did not sign it then. I told him

I would not sign it. I remember telling him that I would not sign it. I do not remember what he said. I do not remember when he came to me again,—I do not know when I signed the paper. No I can't tell about the hour of the day it was when I signed the statement. I do not know where I was when I signed the paper, whether I was in the saloon or not. I do not know what I did next after I signed it,—I got drunk and those fellows got me off home. Some of them told me it was the Gamble boys that got me off home,—I do not remember though who it was. Yes I had drank some before this time at Hico. Yes I had been drunk a time or two before. I bought the bottled beer and put it in my saddle pocket about the third time I was in the saloon. I do not remember which one of the men I bought the bottled beer from. I had not got very drunk when I bought the bottle beer. I do not remember how many bottles I got. I can't say how long that was before I left town and started home. I guess it was about a couple of hours before I left. I do not remember very much between the time I bought the bottle beer and the time I went home. Yes I bought a saddle in town that day. I had been in the saloon a time or two when I bought the saddle. I bought the saddle right after noon. Yes I bought it before I signed this statement. I do not know exactly when I signed the statement, but it was along in the evening sometime. I guess I did ride out of town that evening. Yes since that time I have been indicted in Erath County, Texas,—for malicious mischief, and one thing another. There are several things that they had me charged with up there,—one of your witnesses that you had before was the cause of it. They had us up there for taking some lap robes. Yes I was convicted in two cases for theft.

Re-examined by the PLAINTIFF:

Yes Mays was waiting on the bar while we were in there. He was behind the bar. He had his hat off. Yes he was waiting on customers while we were in there. Yes he did that in the presence of P. O. Cox. Yes I got down some where on the road home that night. I do not know how long I stayed down,—I got over it about ten or eleven o'clock that night. Yes my father had gotten after me for drinking and objected to me drinking.

Cross-examined by the DEFENDANT:

Yes before I went to Hico this time, I had worked for other people than my father and received my own wages without consulting my father. Yes I had traded for myself before that. I bought a buggy from A. L. Phillips before that, and paid him part of it, and he took a lien on the buggy for the rest, and I signed my name to the note I owed him. I do not remember whether he took a mortgage on the buggy or not,—it was only for $15.00. Yes I made the trade in my own name and paid him all but fifteen dollars.

Re-examined by the PLAINTIFF:

I had seen Cox there in Hico before then. I lived about eight or nine miles from Hico. No I do not know whether Cox ever knew about me working for myself or not.

Cross-examined by DEFENDANTS:

Sometimes I would go to Hico maybe twice a week and again I would not be there for a month. Hico was my trading point. I did not get my mail there.

Testimony of John T. Adams.

JOHN T. ADAMS, a witness for the plaintiff testified as follows:—
My name is John T. Adams. I live at Hico Texas. I have lived in Hamilton County about twenty eight years. I know Mr. Thompson, the plaintiff. I have known him about seven years. I
26 know his son, W. W. Thompson, and have known him about the same time. I have lived in Hico going on nine years. I saw W. W. Thompson in Hico on or about May 30" 1902. The first time I saw him he rode up in front of P. O. Cox's saloon, and got down and went in at the saloon door. At that time I was in the millinery department of Wm. Connolley's store. I suppose I stayed there some fifteen or twenty minutes. I did not see him come out while I was there. During that time I was standing where I could have seen him had he come out at the front door. My attention about that time was called back in the store and I went back in there. I intended staying in the millinery department where I could see until he come out of the saloon, but my attention was called back in the store and I went back there without seeing him come out then. If I remember right it was then about one o'clock,—shortly after I come back from dinner. About half an hour after that I saw him riding up the street, and I went in front of the Connolly building and called Mr. Welch's attention to him. I called Mr. Welch's attention to his manner of riding up and down the street, and I told Mr. Welch there was a boy under the influence of liquor already since our new saloon come in. I went to the Southeast corner of the building where I could watch him as he went back to the saloon, and he rode up there and got off and went into the saloon again, and Mr. Welch and I stood there and watched him. I think we stood there somewhere in the neighborhood of twenty or thirty minutes. I took out my little book and put the date down in it so that I would not forget it. Yes he rode up and got off his horse, and went into the saloon, and was in there twenty or thirty minutes and then he come out and got on his horse and rode along in front of Mr. Connolly's grocery store. As he come out of the saloon that time he had two bottles of beer and he put one each in his saddle pockets. I think they were pint beer bottles. Later in the evening I saw the boy again as I went home,—he came out of the saloon door and got on his horse and Mr. Anderson Gamble was helping to get him on and start him on towards home. I ob-

served the boy's conduct at that time. It seems to me that any one that had observed the boy's condition would have said at once that he was drunk,—he could not ride straight and his conduct
27 in town would prove to any one that he was drunk. I have known the boy about seven years,—that was two years ago when he was there in Hico on this occasion. Yes at that time I observed the boy with reference to his age. From his appearance and general conduct of course I would not have taken him to be twenty one years old then. That was the reason I watched him that day, and took out my book and put down the date,—I was satisfied he was under age. The last time I saw him that day was as I went home in the evening.

Cross-examined by DEFENDANTS:

At the time I am speaking of I had been at work for Mr. Connolly about four years. Yes after that I went to see the plaintiff in this suit, and I talked with the old gentlemen and with the boy. Yes I talked to the plaintiff with reference to bring this suit on the liquor dealer's bond. I did not persuade W. B. Thompson to bring this suit. I told him just what I had seen concerning his boy. It was about twelve miles up to where Mr. Thompson lived and I quit my work to go up there and tell him about it. Yes I quit my labor to go out there and do what I considered to be my duty and to help the officers of my County to do their duty. Yes that was to bring this suit. I understood that there could be two cases of it. Yes I understood that this case was to be a civil suit and another a criminal case. No I did not go out there to persuade him to bring a civil suit. I did tell him he could do it. Yes I was working for Wm. Connolly at the time I observed the boy's conduct and put the date of it down. From the first time that I noticed the boy there in Hico, together with the time I watched him and then until I got through with Mr. Chesley, the County Attorney, about the matter, I had taken off about half a day from my work. Yes I put in that time there spying around. As well as I remember the first time in the day I saw the boy was about one o'clock,—it might have been a little before that time, but it was right after I come back from dinner. At that time I had an idea that he was drinking,—he did not show any appearance of being drunk though at that time. The first time on that day that I saw him I saw him ride up and go into the saloon. No when he went in there the first time there was no indica-
28 tion that he was drunk. No as he come out the first time I could not discover any change in him. The first time I saw him I was in the millinery department of Wm. Connolly's store. It was right across the saloon from the street,—I suppose it is about sixty steps between them. No it is not straight across the street,—it is kinder catty cornered. I stood there in the door of Connolly's millinery department,—there were some ladies in there and I called Mr. Connolly's attention to it, and we were talking about it. I was not waiting on any customers then,,—I had just come in from dinner and I stood there and watched until my attention was called back in the store. I stood there and watched some fifteen or twenty

minutes to see if I could see him come out of the saloon. I could not see what the boy did after he entered the front door of the saloon, —Yes I think there were back doors to the saloon. Yes there is a side door to the saloon on another street. The boy came out the same way he went in. I do not know whether Cox or any of his bar tenders saw him in the house or not. All I know I saw him enter the front door, and he was out of my sight for at least fifteen or twenty minutes, for I watched for that purpose. No when he came out of there I could not discover any change in his condition. After he came out he got on his horse and went down in front of Mr. Phillip's and got down and went in, and I am pretty sure that he bought a cow whip. My attention had been called back in the store and after I got through, I went around to the front door and was standing talking to Ed Gamble when he came on down to Phillip's, and I think got a cow whip and then came on up in front of the grocery store. Yes I was still watching him. I called Mr. Welch's attention to it, and the boy went to the saloon and went in again and when he did I began to discover then that he was under the influence of whiskey. No his riding before that had not indicated that he was drunk. He got the beer and put it in the saddle pockets the second time I saw him go in there. When he went back the second time I was standing at the Southeast corner of Mr. Connolly's store where I could see up the street. I saw the boy ride up from Phillip's and ride up to the saloon and get down and go in,
29 and when he come out of the saloon the second time he had two bottles of beer, and he put one in each one of his saddle pockets. Myself and Mr. Welch stayed there twenty or thirty minutes watching him. Yes he was able then to get on his horse himself. He talked a little loud and made a motion to holler, and got on his horse and called Jno. Hill pretty loud and I told Jno. Hill "you ought to try to get Will to go home." He talked to him and we stood and watched him, until he went back in the saloon and then I did not see him any more for a little while, and that was when I went home. He come out of the saloon about that time, and Mr. Gamble talked to him and got him on his horse, and he went up the road ahead of me in a lope. Yes I knew him well, and I knew his father well. The reason I did not interfere with him and keep him out of there was that I preferred the law to attend to such as that. I had no right to go into any man's house and interfere. Yes I saw him around on the street a time or two as I have stated and knew he was getting drunk, but I did not think I was the right man to interfere with him. Yes I simply went from room to room of the Connolly building and out of the streets and watched him. No I did not see any one sell him anything in the saloon. I do not know whether he set down in there or not. Yes he might have walked out of the saloon at the side door. No I could not see in the house. My estimate of the time, is just simply an estimate. I am not extraordinarily anxious that the plaintiff should win in this suit,—all I want to see is the right,—and for the law to be carried out. Yes I think it was right for me to take up the time while I was there employed by Mr. Connolly in watching this boy as I did. I asked Mr. Connolly's permission, and he granted it. I suppose

I must have put in an hour and a half or maybe two hours there that evening watching him. I am satisfied I paid particular attention to the matter there for at least two hours. No I did not go to the boy and say anything to him. Yes I saw Anderson Gamble trying to get him on his horse and get him off home. I never saw the boy there drunk before or since then. Of course I do not know what was in the beer bottles he brought out and put in his saddle pockets, but I think I know what a beer bottle is. Of course if he had
30 those beer bottles filled up with water I could not have told it from where I was. But I am sure it was beer in them as far as that is concerned,—I did not see or taste it, but I am sure it was beer. Yes I am sure it was beer by the looks of it. The first time I saw the boy was right close to one o'clock. When he went out of town it was late in the evening,—I saw him when he was leaving town,—the second time I saw him that evening was between 2:30 and three o'clock. I must have watched him then for twenty or thirty minutes and then he went back into the saloon, and when he went in there the last time, I did not see him come out, but I saw his horse several times, and I watched pretty close. When I started home late that evening I saw him come out of the saloon, and there were two or three trying to get him to go home. Anderson Gamble was the *was the* man that got him started off home. He had been in the saloon that time a long time before he come out. No I did not see him in the saloon. I merely saw him go in and come out. More than that I do not know. That is all that I can testify to,—that I saw him go in and come out as I have stated.

Re-examined by the PLAINTIFF:

At the time I went with Mr. Chesley up to see Mr. Thompson about this matter Mr. Chesley was then County Attorney of Hamilton County. I understood that the State could prosecute a suit about the matter. I went up to Mr. Thompson's with Mr. Chesley and introduced Mr. Chesley to him, and told him that Mr. Chesley was County Attorney, and that I claimed to be a law abiding citizen, and that Mr. Chesley did not know the way up to his house, and I come along with him, and I told him what had happened in Hico about his boy, and told him that Mr. Chesley could tell him what the law was about it, and he could do just as he pleased about it, and I then asked the boy several questions in their presence, and left matters with Mr. Thompson and Mr. Chesley. I saw the boy on the day he was in Hico go into that saloon three times. The first time I saw him go in when I was in the millinery department of Connolly's store, and Mr. Connolly stood there a good little while watching, and I was there fifteen or twenty minutes. The second time Mr. Welch and I stood at the corner about twenty or thirty
31 minutes watching him, I am sure it was thirty minutes. The third time when I saw him go in I stood there ten or fifteen minutes, and it was not more than an hour or such an matter until I started home, and about the time I started home he come out of the saloon.

Cross-examined by DEFENDANTS:

When I went up there with Mr. Chesley I understood he was going up there to investigate the matter. No Mr. Thompson does not live in this County,—he lives in Erath County. No I did not understand that Mr. Chesley could prosecute Erath County cases, but I went to Erath County with him to see a man who had a case in this County. I was satisfied that there would be two cases brought about it.

Re-examined by the PLAINTIFF:

Yes of course I understood that Mr. Chesley could prosecute any suit that arose in Hamilton County.

Testimony of J. E. Welch.

J. E. WELCH, a witness for the plaintiff testified:—

My name is J. E. Welch. I live in Hico Texas, and have lived there about twelve years. I was there about May 30" 1902. I knew the plaintiff, W. B. Thompson, and his son W. W. Thompson. I saw him in Hico about May 30" 1902. I saw him on the streets in Hico. When I saw him Mr. J. T. Adams was with me. On that day I saw W. W. Thompson go into P. O. Cox's saloon. Yes I saw him come out of that saloon. From the time he went in there until he come out was about ten or fifteen minutes. At that time I was in Connolley's millinery establishment. I saw him after that. At that time I was in front of Mr. Connolley's house on the corner there. I saw him go back into Cox's saloon that time. Yes I saw him come out. It was about twenty five or thirty minutes from the time he went in until he come out. I saw him again after that. I saw him get on his horse and ride in front of Mr. Connolly's store. I observed his saddle pockets then,—he had two bottles in them. They were round bottles. He brought the bottles out of the saloon with him and put them in his saddle pockets, and after that I saw them in the saddle pockets. I saw him ride down about in
32 front of Phillip's and then I did not see him any more. Yes I observed his general appearance at the times I have stated. I observed his size and conduct. From my observation of him I would not have taken him to be twenty one years old at the time. I had not seen him before that day.

Cross-examined by DEFENDANTS:

It was along about two or three o'clock in the day when I first saw this boy. Yes Jno. Adams and myself were in Connolly's millinery establishment. John Adams first called my attention to the young man. There was nothing unusual then in his appearance only going into the saloon. No I could not and did not see him after he entered the door. No I do not know whether he saw any one or any one saw him inside the saloon or not. It was about ten or fifteen minutes before he come out. No I do not know what was being carried on in the saloon at that time. No I could not see

whether he bought anything or not after he went in there. I think there is a side door and a back door to that saloon. He could have gone out at either of those doors and me not have seen him. Some little bit after that we were around on the corner by Mr. Connolly's store, and he went in again and we talked about it. I think about half an hour intervened between the first time I saw him come out and the second time I saw him go in. When I first saw him he was walking. I could not say that there was any one with him, for I do not remember. There were several around there. Yes something like a half hour after that I saw him go in the second time. He was on his horse when he come up that time. I do not remember from what direction he come,—he just rode up and hitched his horse and went in the saloon. There were several present about the saloon, but I do not remember any of them. Mr. Adams and I were standing about Connolly's corner when we saw him ride up there the second time. The saloon is diagonal across the street from that corner,—I do not know the distance. It was about twenty five or thirty minutes from the time he went in then until we saw him come out. Mr. Adams and I did not do anything during that time only stand there and talk. No I could not see him after he went into the saloon,

33 No I do not know whether he got anything from any one in there or not. No Ido not know whether or not he went out at the back or side door,—I could not have seen him if he did. All I can say is that I saw him go in the main front door and then saw him come out the same door in about twenty five or thirty minutes. I could not tell from his actions when I saw him then whether or not he was under the influence of whiskey,—he was too far from me,—that was the first time, and he was down on the ground going into the saloon. When he come out of the saloon and put the bottles in his saddle pockets he acted like he was drinking,—he talked a good deal like a drinking man and when he got on his horse he reeled in his saddle,—he was going on like a drunk man. Yes I heard him call *Jon.* Hill. He did not stay there in front of Connolly's store over two or three minutes. He then went towards Mr. Phillip's. I could not tell whether he got off his horse there or not,—I lost sight of him about the time he got down there. I quit watching him, for I thought I had seen about enough of him. I did not see Anderson Gamble start him home. No if the boy had made a statement in writing to me that he was twenty one years old on that occasion I would not have believed it,—he looked to be a boy all the time.

Re-examined by the PLAINTIFF:

When I saw him come out of the saloon he come out the same way that he went in.

Testimony of T. S. McKinley.

T. S. MCKINLEY, a witness for the plaintiff testified:—

I was formerly Sheriff and Tax Collector of this County. I know P. O. Cox, one of the defendants in this suit. I remember the cir-

cumstance of this case being tried here before. I had a conversation with P .O. Cox about this case before the first trial. I think the conversation occurred in Main & Chesley's office. He made a statement to me with reference to how many times young Thompson had been in his saloon that day before he got him to sign a statement. He said that he had been in his saloon three or four times that day before he got him to sign the statement. He said he was in there at least eight or ten times that day.

Plaintiff rests.

34 *Testimony of John May.*

JOHN MAY, a witness for the defendants testified:—

M name is John May. I live at Comanche Texas. In May 1902, I lived in Hico Texas, and was tending bar for Cox & Co. I remember the circumstance of a young man named Thompson coming into the saloon about the latter part of May 1902, while I was bar tender in there. When he first come in I asked him if he was twenty one years old. He said that he was. There was another fellow with him,—I think his name was McFadden. He said 'yes that is right,' or something like that. As well as I remember I sold him some beer. From his appearance and from his statement I believed that he was twenty one years old. After he drank the beer he went out. I do not remember at which door he come in or at which one he went out. In a short time he come back again. As well as I remember the same man was with him this time. I believe I asked him again this time if he was twenty one years old, and he claimed that he was twenty one the same as he did before,—I asked him that once or twice,—I won't be sure about that. Mr. Cox told me not to sell any minor whiskey. After he told me and after the other man told me he was twenty one I believed that he was. I could not say positively how many times he came in there that day,—he came in several times. Later on Mr. Cox drew up a statemen and wanted him to sign it and I believe he refused to sign it at first, and later on signed it as well as I remember. It was in the evening some time when Mr. Cox presented him the statement to sign. I did not at any time see him sitting around there. I do not think he sit down while he was in the saloon,—if he did I did not see him. No I can't tell you how many times he come in there that day. I do not remember whether he bought any whiskey that day or not,—he might have drank whiskey part of the time. As well as I remember he carried some bottle beer off with him when he started home,—I think he put it in his saddle pockets. I do not remember how many bottles he had. Yes I had had experience before that as a bar keeper. From the young man's appearance, demeanor, and looks, and conduct, together with his statement to me that he was twenty one years old, I believed that he was twenty one years old.

35 Cross-examined by the PLAINTIFF:

I am not doing anything at Comanche now. The reason I asked his age when he came in, was that when a young looking fellow comes in it is natural to ask him his age,—if he is twenty one. I was a little bit suspicious when I first saw him come in. Yes I asked him his age on that account. Yes I believed I asked him if he was twenty one years old the second time he come back. Yes he told me then he was twenty one years old. Yes then Mr. Cox got suspicious and prepared a written statement for him to sign he refused to sign it, but later on signed it. Yes I testified once in this case before. I cannot say how long he stayed in there after he took his first drink,—he did not stay so very long. He stayed there at the bar a few minutes and was talk- to people in there,—I was busy though and did not pay much attention to him,—but he did not stay in there so very long. No he did not turn immediately around and walk out as soon as he got the drink,—he did not stay there though over three or four minutes. I can't tell you how many times he come in there that day. I guess he was in there as many as four of five time- during the day. Q. Each time he would come in there he would drink and stand around and talk? A. No- every time. Q. Sometimes he would do that? A. He did not stand around long. I do not remember exactly what I testified before,—I am just testifying as near as I can remember it now. Yes the young man did talk to some parties in there. No I am not certain as to how many time- he was in there that day,—he would come in and go out again. At that time I was employed by Cox as bar tender. Yes young Thompson paid for the drinks. The other fellow that was with him was named McFadden. I believe they kinder taken it time about in paying for the drinks. Yes I know that all of the drinks were paid for. I am not certain though that Thompson paid for all of them. When Cox got him to sign this statement he had been in there a short time that time, and then Cox went to him with the statement. After he signed that statement I think he went out again. After he signed that statement I do not know whether Cox cared if he stayed in there or not.—I
36 didn't if Cox didn't. After he made the statement if it was al-right with Cox it was al-right with me for him to stay in there. No I did not object to his coming in the house. I did not hear Cox object to it. I did not try to expel him from the house. I did not hear Cox try to expel him. I heard part of the conversation between Cox and Thompson when he got him to sign the statement. I did not hear Cox tell him that there were some people on the outside complaining, and if he would sign the statement it would save him. No I did not hear all the conversation. I was waiting on the bar.

Re-examined by the DEFENDANTS:

Certainly the reason I did not invite Thompson out the first time when he come in, was that he told me he was twenty one years old. Yes that time he stayed there at the bar a few minutes. I do not

remember whether he handed *me* the exact change or whether I had to make change. I do not remember what time in the day it was that Cox asked him to sign this statement,—it was sometime in the evening. We sold whiskey drinks there for a bit (12½ c.). Once in a while we sold it at 10c.,—if a man would lay down a dime we would take it. I expect we charged Thompson a bit a drink. It was pretty late in the evening when Thompson was in there the last time. I do not remember whether McFadden come back with him each time or not.

Cross-examined by the PLAINTIFF:

He did not get to talking very loud in the house. I do not remember that Mr. Cox went to him and asked him to get quiet. I do not know that he was very full that evening,—I have seen men lots fuller than he was,—I expect he was a little bit full. Yes he was in that condition when he left that evening.

Testimony of J. A. Gamble.

J. A. GAMBLE, witness for defendants testified:—

My name is J. A. Gamble. I live in Hico Texas. I have lived there for about twelve years. I remember about May 30" 1902 of seeing W. W. Thompson there in Hico in Cox's saloon. I saw him sign a statement in writing that day. That statement you
37 exhibit to me is the statement,—it was signed by me as a witness. Yes Thompson signed that statement. I had just stepped into the saloon, and soon after I went in Mr. Thompson come in, and when we walked in he asked me to go and take a drink with him, and I told him al-right and we walked to the bar and Mr. Cox called him back from the bar and said a few words to him, and he just turned around and remarked that he did not have to sign anything to get what he wanted to drink, that he could get it without signing anything, and Cox said 'well you can't get it here.' He said you can't get anything else here, or nothing else here without signing it,—that he did not know he was twenty one years old, or something to that amount. I think I asked Mr. Cox myself what it was and he said it was a certificate stating the young man's age. I told the boy 'if you are twenty one years old, there is nothing wrong in signing the statement, but if you are not I would not sign it.' He said 'O, hell, if that is all I will sign it, and walked back and signed his name to it, and Cox asked me and Farrow if we would witness it and we did. Thompson then walked back to the bar and we got the drink. He did not stay in there over ten minutes after that, if that long. I do not suppose we were in there over ten minutes, and Thompson then walked out to his horse he stood there about his horse for some ten or fifteen minutes, and then got on his horse and galloped off up the street and that was the last I saw of him. I observed the young man at the time of the signing of this statement, and from his appearance, demeanor and conduct, I believe- him to be over twenty one years old.

Cross-examined by the PLAINTIFF:

If he had not signed this statement, I would have just believed that he did not want to sign it. Just looking at the boy I would have taken him to be twenty one years old, independent of the statement. No he did not look to be as much as twenty five years old. Yes he looked young to be in a saloon. He was under the influence of whiskey when I saw him. Yes he was talking pretty loud. We did not talk more than two or three minutes after we drank, and he then went out of the house,—no one took him
38 out. I was there with him before we drank just a few minutes. I was renting the building to Cox then. I did not see the boy on any other occasion in that saloon that day. He and I drank whiskey together. I did not pay for it.

The defendant offered in evidence the following statement:—

Statement of W. W. Thompson Offered by Def'ts.

HICO, TEXAS, 190–.

"M..... to Favorite Saloon, Dr: Fine Wines, Liquors, and Cigars. Keg and Bottle Beer.

This is to certify that I am twenty one years of age, this the thirtyth day of May 1902.

W. W. THOMPSON.

Witness,
H. FARROW.
J. A. GAMBLE."

Testimony of J. W. Newsome.

J. W. NEWSOME, a witness for defendant testified:—
My name is J. W. Newsome. I live at Hico and except two years have lived here since 1893. I work for A. L. Phillips. I was acquainted with W. W. Thompson in May 1902. He was in the store that day and we dealt with him. From his manner, appearance, and general demeanor, on that day I would judge him to be twenty one years old. We sold him a buggy before that and he paid part of it and gave his note for the balance.

Cross-examined by PLAINTIFF:

We are very particular about not selling to a boy. Yes where we would sell a buggy and get all but $15.00 down we would still be very particular about selling to a boy. No we would not sell to a minor if he was to come in and pay all but $15.00 down,—our rules would not permit that. Mr. Gamble sold him the buggy,—he did not pay it all but $15.00. He paid $50.00 and the balance was $50.00, and he came in afterwards and paid all of the balance but $15.00. He paid all but $15.00 the day he was in town painting it

red. I would take the boy to be twenty two or three years old. Yes I used to be in the saloon business myself. I do not know
39 how old the boy was then. I did not ask him. I am pretty well acquainted in Hico. It seems to me like Cox was there a short time before he went into the saloon business. He come there from Comanche Texas. No he had not been a resident there. He come there just before he put in the saloon business.

End of the case.

Agreement of Att'ys to Statement of Facts.

We, Main & Chesley, Attorneys for the plaintiff, and Dewey Langford, Attorney for the defendants in the above entitled and numbered cause, hereby agree that the above and foregoing is a true and correct statement of the facts proved on the trial of said cause and respectfully ask that the same be approved and ordered filed as a part of the record in said cause.

MAIN & CHESLEY,
Attorneys for the Plaintiff.
DEWEY LANGFORD,
Attorney for the Defendants, P. O. Cox, Sam Levy, & W. M. Evans.

Judge's Approval of Statement of Facts.

Filed April 12", 1904.

I, N. R. Lindsey, Judge of the 52" Judicial District of Texas certify that I have examined the foregoing approved statement of facts, and that I find the same to be correct, and I approve the same and order the same filed as the statement of facts in said cause.

Witness my hand this April 9" 1904.

N. R. LINDSEY,
Judge 52" Judicial District of Texas.

No. 1336. The State of Texas *vs.* P. O. Cox *et al.* Statement of Facts. Filed April 12th 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

General Charge of the Court.

Filed March 22", 1904.

In the District Court of Hamilton County, Texas, February Term, 1904.

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

GENTLEMEN OF THE JURY: In this case, the State of Texas, sues the defendants, P. O. Cox, Sam Levy and W. M. Evans to recover statutory penalties for alleged breaches of the defendants P. O. Cox liquor dealer's bond.

(1.) The defendants in their answer deny all and singular the allegations in plaintiff's petition contained and further specially plead, that if P. O. Cox his agents or employees sold or gave intoxicating liquor or consented that intoxicating liquor be sold or given to W. W. Thompson that such sale or gift was made in good faith with the belief that said W. W. Thompson was of age, and that the seller had good grounds for such belief, and further plead that if the said W. W. Thompson ever entered and remained in the saloon of P. O. Cox, with the permission of P. O. Cox his agents or employees that *that* said W. W. Thompson, so entered and remained in the saloon of the said P. O. Cox, for the purpose of procuring intoxicants and that the said P. O. Cox his agents and employees believed in good faith that the said W. W. Thompson was then twenty one years of age, and had good grounds for said belief, and that the said W. W. Thompson entered and remained in said saloon, if at all, no longer that was reasonably necessary to procure said intoxicants.

(2.) You gentlemen of the jury, are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given to the testimony, but you are bound to receive the law from the court, which is herein given you and be governed thereby.

(3.) Within the meaning of this charge whiskey and beer are each intoxicating liquors.

(4.) Now, if you believe and find from a preponderance of the evidence that the defendant P. O. Cox, was, on or about the 30th day of May 1902, a licensed retail liquor dealer, and engaged in the retail liquor business, in Hico Hamilton County Texas, under the bond in evidence before you, and if you further believe from a preponderance of the evidence, that on *o*f about the 30th day of May 1902 the defendant P. O. Cox, his agents or employees knowingly permitted W. W. Thompson, to enter and remain in his P. O. Cox's saloon or house, said house being the house wherein the said P. O. Cox, was conducting the business of a retail liquor dealer, (if he was so) and if you further find from a preponderance of the evi-
41 dence that the said W. W. Thompson, was then and there under the age of twenty one years, and that the said entry

and remaining in said saloon, if any, by the said W. W. Thompson was without the consent of any person authorized to give consent to said entry and remaining in said saloon, then if you so believe from the evidence you will find for the plaintiff, under paragraph 3 of plaintiff's petition and assess plaintiff's damage at five hundred dollars for each time you find that the said W. W. Thompson was so permitted to enter and remain in said saloon or place of business of the said defendant P. O. Cox, not to exceed the number of breaches alleged in said paragraph 3 of plaintiff's petition.

(5.) If you do not so believe from the evidence you will find for the defendant on the issue of the said W. W. Thompson, entering and remaining in the saloon or place of business of the defendant P. O. Cox, and in this connection you are instructed. If you believe and find from the evidence that the said W. W. Thompson was on the 30th day of May 1902 a person under the age of twenty one years, and that he was on or about the said 30th day of May 1902 permitted by the defendant P. O. Cox, his agents and employees, to enter and remain in the saloon or place of business of the said P. O. Cox as alleged in plaintiff's petition but if you further believe and find from the evidence that the said W. W. Thompson entered said saloon for the purpose of procuring intoxicating liquor and that the said defendant P. O. Cox, his agents or employees, sold the said W. W. Thompson intoxicating liquors, but at the time said liquor was sold to him, the person selling said liquor to the said W. W. Thompson, did so in good faith believing at the time of said sale if any, that the said W. W. Thompson was then twenty one years of age, and that the person making said sale, if any, then had good grounds to believe that the said W. W. Thompson was twenty one years of age, and if you further believe from the evidence that the said W. W. Thompson, on said occasion did not remain in said saloon for a longer time, than was reasonably necessary under the circumstances, to procure said liquor; that is, if the said W. W. Thompson remained in said saloon for such a length of time only as was reasonably necessary, for him, under the circum-
42 stances, to purchase the liquor, drink and pay for the same, you will find for the defendants, on the issue of the said W. W. Thompson entering and remaining in said saloon, but you are further instructed in this connection, if you believe and find from the evidence that the said W. W. Thompson, after entering the said saloon of the said P. O. Cox, (if he did so) loitered or remained in said saloon with the knowledge and consent of the said Cox, his agents or employees for a longer time than was reasonably necessary, under the circumstances, for him to purchase drink and pay for the liquor for which he entered said saloon, and that he was then under the age of twenty one years, and that he entered said saloon, without the consent of any person authorized to consent to said entry, you will find for the plaintiff and assess the damage as hereinbefore directed.

(6.) Upon the issue of the sale by the defendant P. O. Cox, his agents or employees, of intoxicating liquors to the said W. W. Thompson, you are charged.

(7.) If you believe and find from a preponderance of the evidence, that after the defendant executed the bond in evidence before you and after the defendant P. O. Cox engaged in the business of a retail liquor dealer in Hico, Hamilton County Texas under said bond, (if he did so) that he the said P. O. Cox, his agents or empolyees sold in the saloon of the said P. O. Cox, intoxicating liquor to the said W. W. Thompson on or about the 30th day of May 1902, as alleged in plaintiff's petition and that said W. W. Thompson was then and there a person under the age of twenty one years, and that no person authorized to consent to said sale, if any, consented thereto, then if you so find from the evidence you will find for the plaintiff under paragraph 4 of plaintiff's petition and assess plaintiff's damage at five hundred dollars for each sale, not in any event to exceed the number of sales alleged in said paragraph 4 of plaintiff's petition. But in this connection you are instructed. If you believe and find from a preponderance of the evidence that the defendant P. O. Cox, his agents or employees sold intoxicating liquor to the said W. W. Thompson as alleged in plaintiff's petition,
and that the said W. W. Thompson was then a person under
43 the age of twenty one years at the time of said sale, if any,
but if you further believe from that evidence that the person making such sale did so in good faith with the belief that the said W. W. Thompson was then twenty one years of age and if you further believe from the evidence that such person making such sale, if any, then had good — for such belief, you will find for the defendants on the issue of the sale of intoxicating liquor to said W. W. Thompson.

(8.) If you find for the plaintiff you will state in your verdict the number of infractions of the bond in evidence before you, that you find, and assess the damage at five hundred dollars for each infraction you will also state what infractions (if any) you find, this is, if for entering and remaining so state and if for sale or sales so state, giving the number, if any, in each instance, but in the aggregate, you will not assess damage, if any, for more than four infractions.

N. R. LINDSEY,
Judge 52d Judicial Dist.

No. 1336. The State of Texas *vs.* P. O. Cox *et al.* General Charge of the Court. Filed Mch. 22d 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

Special Instruction Asked by Def'ts.

Filed Mch. 22d, 1904.

In District Court of Hamilton Co., Texas.

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

GENTLEMEN OF THE JURY: You are instructed that under the law in making a sale of beer or whiskey to the minor, if any was made by P. O. Cox or his agents or employees, there can be but one infraction of the bond: That is, if P. O. Cox his agents or employees sold intoxicants to the alleged minor under conditions that would be a violation of the terms of his liquor dealer's bond you could not, for the same transaction, find that there was a violation also if the condition of the bond for permitting the minor to enter and remain unless you should believe from the evidence that after procuring the whiskey or beer (if he did so) he then loitered or re-
44 mained in defendant Cox's saloon or place of business with the knowledge and consent of the said Cox, his agents or employés for a longer time than was reasonably necessary to procure said whiskey or beer.

N. R. LINDSEY,
Judge Presiding.

No. 1336. The State of Texas *vs.* P. O. Cox *et al.* Special Instruction asked by defts. Filed 22d day of Mch. 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

Special Instruction No. 1 Asked by Def'ts.

Filed Mch. 22", 1904.

In District Court of Hamilton Co., Texas.

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

Now comes the defendants by atty. and ask the Court to charge the jury as follows:—You are instructed that under the law in making a sale of beer or whiskey to the minor, if any was made, by P. O. Cox or his agents, or employés there can be but one infraction of the bond; that is if P. O. Cox, his agents or employés sold in-

toxicants to the alleged minor under conditions that would be a violation of the terms of his liquor dealer's bond you could not for the same transaction find that there was a violation also of the condition of the bond for permitting the minor to enter and remain.

DEWEY LANGFORD,
Att'y for Def'ts.

Refused, because this charge is given with modifiaction in the main charge.

N. R. LINDSEY,
Judge Presiding.

No. 1336. The State of Texas *vs.* P. O. Cox *et al.* Special Instruction No. 1, asked by defendants. Filed 22" day of, Mch. 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

45 *Verdict and Judgment.*

In District Court of Hamilton County, Texas, February Term, 1904.

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

Now on this 22nd day of March, 1904, this cause came on to be heard, and the plaintiff appeared in proper person and by attorneys, and also came the defendants in person and by attorney and both parties announced ready for trial.

The- came on to be heard the exceptions of the defendants general and special to the plaintiff's petition, and the Court having considered same and having heard the argument of counsel thereon, and being advised as to the law applicable thereto, overruled said general and special exceptions to which action of the Court in overruling same the defendants in open Court excepted.

Then came on to be heard the plaintiff's general and special exceptions to the defendants answer and the Court having heard and duly considered same, and the argument thereon, and being advised as to the law overruled the said plaintiff's exceptions to which action of the Court the plaintiff, in open Court excepted, and a jury having been demanded, a jury of twelve (12) men, to wit. A. D. Bullard and eleven others, were duly and legally drawn, sworn and empaneled to try this cause, and said jury having heard the evidence and the argument of counsel for both plaintiff and the defendants, and having read and received the charge of the Court together with the pleadings of the parties, retired to deliberate upon their verdict; and afterwards, to-wit, on the 23rd day of Mch. 1904, returned into open Court the following verdict which was duly and legally received and filed by the Clerk of this Court, to wit:—

"We, the jury, find for the plaintiff 3 infractions of the bond for

entering and remaining in said Cox's saloon, and assess the plaintiff's damage at Five Hundred Dollars in each, first, second and third infractions of said bond, and at $1500.00 in the aggregate.

A. D. BULLARD, *Foreman.*"

46 Wherefore, it is the opinion of this court that in accordance with said verdict of said jury, that the plaintiff, The State of Texas, should have and recover of and from the defendants P. O. Cox as principal, and Sam Levy and W. M. Evans as sureties jointly and severally the sum of $1500.00 and the costs of this suit.

It is therefore ordered, adjudged and decreed by the court that the plaintiff, The State of Texas, do have and recover of and from the defendants, P. O. Cox as principal and Sam Levy and W. M. Evans as sureties, jointly and severally the sum of $1500.00 damages for three infractions of the Liquor' Dealer's Bond sued on as found by the verdict of said jury, together with 6% interest thereon from this date, and for all costs in this behalf incurred, for which let execution issue against the said P. O. Cox, Sam Levy and W. M. Evans or against either of them.

Defendants' Motion for New Trial.

Filed Mch. 25th, 1904.

In the District Court of Hamilton County, Texas, February Term, 1904.

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

Now comes the defendants in the above styled and numbered cause by attorney and pray the court to set aside and hold for naught the verdict of the jury and the judgment of the court thereon rendered on to wit, the 23rd day of March 1904 and grant them a new trial, for the following reasons.

1st. The Court erred in overruling defendants' demurrer to plaintiff's petition to the effect that the section regulating the sale of liquor and prescribing the tax and penalty is unsonstitutional, construed in connection with Art. 5060*i*, in that said Art. exempts from the provisions of the statute people engaged in the same business, to wit, selling intoxicating liquors, provided they sell wine produced from grapes grown in this State by the seller. Because said act regulating the sale of liquor and providing a tax and penalty is unconstitutional and repugnent to the 14th Amendment of the Federal Constitution, providing that no State shall deny to any person within its jurisdiction the equal protection of the law. And the
47 effect of said act when construed in connection with said Art. 5060*i*, is to deny to persons within the jurisdiction of the State of Texas the equal protection of the law.

2nd. The Court erred in giving Paragraph No. four of his charge to the jury because said paragraph refers the jury to paragraph three of plaintiff's petition in assessing the damage if any they should find, instead of stating the law applicable in such contingency; and because said paragraph was probably harmful to the defendants in stating to the jury that they should not find a greater number of breaches than was claimed by plaintiff thus calling the special attention of the jury to the alleged breaches.

3rd. The Court erred in giving paragraph five of his charge to the jury because said paragraph informs the jury in effect that if the alleged minor entered and remained in the saloon only so long as was necessary to purchase the liquor, drink and pay for the same then they will find for the defendants because said defense is too restricting in that if said minor entered and remained for any legal purpose and remained only so long as was necessary then there would be no infraction of the bond and said charge was harmful and prejudicial to the defendants in view of the testimony to the effect that on one occasion the alleged minor talked with the said P. O. Cox in reference to signing a statement respecting his age. And said paragraph of said charge is erroneous and misleading in that the defense pleaded by these defendants was not clearly stated in an affirmative manner and because said charge is on the weight of the evidence.

4th. The Court erred in giving paragraph eight of the Court's instructions to the jury wherein the jury are instructed as to the form of their verdict should they find for the plaintiff because said instruction does not inform the jury how they shall frame their verdict should they find for the defendants and thereby the jury are probably led to believe that the court thought that they could in no contingency find for the defendants.

5th. The Court erred in not giving and in refusing special charge No. 1 asked by the defendants which is here referred to and made a part hereof, because said charge as requested by the defend-
48 ants was the law of the case.

Wherefore defendants pray that said verdict and the judgment thereon rendered be set aside and held for naught and that they be granted a new trial.

DEWEY LANGFORD,
Attorney for Defendants.

No. 1336. The State of Texas *vs.* P. O. Cox *et al.* Defendants' Motion for New Trial. Filed Mch. 25th 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

Order Overruling Motion for New Trial and Notice of Appeal and 20 Day Order within which to File Statement of Facts and Bill of Exception.

In District Court of Hamilton Co., Texas, February Term, 1904.

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

On this the 25th day of March 1904, came on to be heard and considered the motion of defendants to set aside the verdict and judgment in this cause rendered, on to wit, the 23rd day of March, 1904, and after hearing the reading of said motion and being advised of the law the same was in all things overruled and denied by the Court, to which action and ruling of the Court the defendants excepted and in open Court gave notice of appeal to the Court of Civil Appeals for the 3rd Supreme Judicial District of Texas, at Austin. And it is ordered by the Court that the parties herein be granted twenty days after the conclusion of the term to prepare and file statement of facts and bills of exception.

Supersedeas Bond.

Filed April 13th, 1904.

In the District Court of Hamilton County, Texas.

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

Whereas in the above styled and numbered cause, pending in the District Court of Hamilton County, Texas, and at a regular term of said Court to wit, on the 23rd day of March 1904, The State of Texas recovered judgment against the said P. O. Cox, Sam Levy and W. M. Evans for the sum of one thousand and five hundred dollars with interest thereon from the 23rd day of March 1904, at the rate
49 of six per cent. per annum, and all costs of suit (and whereas on the 25th day of March 1904, a motion theretofore filed by the said defendants P. O. Cox, Sam Levy and W. M. Evans praying for a new trial was overruled, to which action of the Court the defendants, P. O. Cox, Sam Levy and W. M. Evans then and there excepted and gave notice of appeal to the Court of Civil Appeals of the Third Supreme Judicial District of Texas, at Austin)

from which judgment and order the said P. O. Cox, Sam Levy & W. M. Evans have taken an appeal to the Court of Civil Appeals for the Third Supreme Judicial —, at Austin, Texas.

Now therefore we P. O. Cox, Sam Levy & W. M. Evans as principals and C. J. Swasey and W. J. Hefley as sureties, acknowledge ourselves bound to pay The State of Texas the sum of Three Thousand and Five Hundred Dollars.

Conditioned that the said P. O. Cox, Sam Levy & W. M. Evans appellants shall prosecute their appeal with effect, and in case the judgment of the Supreme Court or Court of Civil Appeals shall be against them, they shall pay its judgment, sentence or decree, and pay all such damages as said Court may award against them.

Witness our hands this 12th day of April, A. D. 1904.

P. O. COX.
SAM LEVY.
W. M. EVANS.
C. J. SWASEY.
W. J. HEFLEY.

STATE OF TEXAS, *County of Tarrant:*

I Jno. A. Martin, Clerk of the District Court, in and for Tarrant County, do hereby certify that the sureties on the within bond, are in my opinion, good and ample security for amount therein specified, and that I would accept and approve same if presented to me.

Given under my hand and seal of office at Fort Worth, Texas this 11- day of April 1904.

JNO. A. MARTIN,
Clerk District Court, Tarrant Co., Tex.

Approved this the 13th day of Apr. 1904.

R. C. CORNELIUS,
Dist. Clerk Hamilton Co., Texas.

50 No. 1336. The State of Texas *vs.* P. O. Cox *et al.* Supersedeas Bond. Filed Apr. 13th, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co., Texas.

Assignment of Errors.

Filed June 15th, 1904.

In the District Court of Hamilton County, Texas.

No. 1336.

STATE OF TEXAS
vs.
P. O. COX ET AL.

Now Comes the defendants and assign the following errors in the above styled cause.

1. The court erred in its charge to the jury in permitting and

directing a recovery in favor of plaintiff on any phase of the case on a finding by the jury on a preponderance of the evidence, in that the recovery herein being a penalty and the action being one highly penal in its nature, it becomes and was necessary for the jury in order to find for the plaintiff on any phase of the case presented to find the facts warranting such finding to exist from the evidence beyond a reasonable doubt.

2. The court erred in the fourth paragraph of its charge and in the fifth paragraph in so far as it is in connection with the fourth in directing a verdict for plaintiff if the jury should find and believe from the preponderance of the evidence that the facts in said fourth and fifth paragraphs set out existed in so far as it submitted to the jury the issue as to whether or not P. O. Cox was on or about the 30th day of May, 1902 a licensed retail liquor dealer in Hico, Hamilton County, Texas, in that there is absolutely no scintilla of evidence warranting the submission of such issue, there being no proof of any kind, character or description by inference or otherwise in the evidence that any license was ever issued by any person to the said P. O. Cox or that he was a licensed retail dealer.

3. The verdict of the jury is contrary to the law and without evidence to support it, in that there is absolutely no evidence or scintilla thereof that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico, Hamilton County, Texas, it appearing
51 that no license was introduced in evidence and that no proof of any kind was made to supply the failure to introduce the license.

4. The Court erred in directing a verdict for the plaintiff in any event under the evidence, for that there is no evidence or scintilla thereof going to show that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico.

5. The court erred in the fourth paragraph of its charge and in the fifth paragraph in so far as it is in connection with the fourth in directing a verdict for plaintiff if the jury should find and believe from the preponderance of the evidence that the facts in said fourth and fifth paragraphs set out in so far as it submitted to the jury the issue as to whether or not P. O. Cox was on or about the 30th day of May, 1902 a licensed retail liquor dealer in Hico, Hamilton County, Texas, in that it appears from the pleadings, the only place in which a license is mentioned, that a license was issued to P. O. Cox & Co., a retail liquor dealer in Hico, Hamilton County, Texas, and while the pleadings allege that P. O. Cox was doing business under the name of P. O. Cox & Co. yet there is no scintilla of evidence to show or indicate that P. O. Cox was doing business under the name of P. O. Cox & Co.

6. The verdict of the jury is contrary to the law and the evidence in that there is absolutely no evidence to show that P. O. Cox was doing business in the name of P. O. Cox & Co., there being no evidence or scintilla thereof upon the subject in the record and every inference in the record that can be drawn upon the subject going to show that P. O. Cox & Co. was a firm composed of at least two persons.

7. The Court erred in its charge to the jury in assuming that P. O. Cox was doing business under the name of P. O. Cox & Co., for that there is absolutely no evidence in the record warranting the said assumption.

8. The Court erred in submitting to the jury in its charge continually and with reiteration the issue as to the entry of the said Thompson into the said saloon with or without the consent of some person authorized to give consent, for that the Court had
52 erroneously permitted the father of the said Thompson to testify that he did not give his consent to the said entry and the continual reiteration of the said issue had a tendency to direct the jury's mind unduly to the testimony of the father and had a tendency to cause them to give undue weight to the effect that the entry was made without the consent of the father and had a tendency to cause them to find for the plaintiff upon the issue of the entry and remaining to the injury of the defendant, and said issue which was immaterial and irrelevant was given undue prominence in the case and there being no dispute as to the facts of the said issue it in its nature must have injuriously affected the case of the defendant before the jury.

9. The Court erred in its charge to the jury wherein the jury is instructed as to the form of their verdict if they found for the plaintiff, in that the charge does not inform the jury as to the form of their verdict if they found for defendants, thereby probably leading the jury to infer or believe that the Court thought that in no contingency could they find for the defendants.

10. The Court erred in its charge in that the same is contradictory and confusing and in the nature thereof undoubtedly affected injuriously the cause of the defendants, in that in the fourth paragraph of its charge it instructs the jury directly to find for the plaintiff on the issue of the entry and remaining if they believed from the preponderance of the evidence that the defendant Cox or his agents knowingly permitted W. W. Thompson to enter and remain in his house or saloon wherein he was conducting the business of a retail liquor dealer if the said Thompson was then and there under the age of twenty one years, this paragraph being short, concise and complete within itself and without qualification. And in the fifth paragraph of the Court's charge which is quite lengthy the Court undertakes in some measure to avoid the effect of the fourth paragraph by charging the jury amongst other things that if the jury believes from the evidence that the said Thompson entered the said saloon for the purpose of procuring intoxicating liquors and that the same were sold to him and that the persons selling the same did so in good faith believing him to be twenty one years of
53 age and having good grounds for such belief and that the said Thompson did not remain in said saloon for a longer time than was necessary under the circumstances to procure said liquor that is to purchase drink and pay for same, that they should find for the defendant, but in the same paragraph of the same charge the converse of the proposition is given, making the fifth paragraph of the charge a complete charge in itself upon all phases

of the entry and remaining that could be submitted in this case and making it a complete exposition of the law of the same unless another assignment of error that we make herein should be well taken, and said fifth paragraph used no words purporting to qualify the fourth paragraph. The effect of the two charges is such that an absolute and positive irreconcilable conflict exists. The fourth paragraph directs a recovery absolutely without reference to any excuse and the fifth paragraph directs a recovery conditionally and deals with all phases of the situation. The contradiction and confusion are still further accentuated by the giving of the special charge asked by the defendants wherein the jury are told that a recovery can be had but for one infraction of the bond at one time.

11. The Court erred in permitting or directing a verdict in favor of the plaintiff herein in any event under the evidence, for that the evidence shows that the application made by P. O. Cox was for a license to do business at two separate and distinct places and the allegation that license was issued to do business at the place in the application mentioned shows that the license was void upon its face even though the Court should hold that it was necessary to introduce the license in evidence or make proof that the license was issued.

12. The Court erred in its charge in directing a recovery in favor of plaintiff in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that under the charge in such case the entry must have been lawful and the recovery is permitted solely for unlawfully remaining without an unlawful entry.

13. The Court erred in its charge in directing a recovery in favor of plaintiff in case the minor loitered in the saloon after
54 purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that it not being unlawful for a minor to enter and remain in a saloon for a length of time sufficient to purchase a drink and pay for same if the saloon keeper sells the same in the belief that the minor is twenty one years of age and has good grounds for such belief, it must result that the legislature contemplated that entry and remaining under such circumstances were not violations of the bond and that no recovery could be had for a remaining after entry under such circumstances.

14. The Court erred in that it rendered judgment against the defendants on said bond, for that the law requiring the giving of the same is unconstitutional being violative of Section 1 of Article 14 of the United States Constitution in that it is class legislation and also Article 3 of the bill of rights of the State of Texas.

15. The Court erred in that it rendered judgment upon said bond against the defendants for that same is violative of Section 8 of Article 1 of the Constitution of the United States, same being in restraint of interstate commerce.

16. The Court erred in that it submitted any issue of liability upon the bondsmen and the sureties in this case, for that the bond sued on is a statutory bond and is more onerous than same could be legally made and is more onerous than is required by law in that same is a joint and several obligation and binds the maker and

sureties thereon jointly and severally and their heirs, executors and administrators for the payment of same, whereas said bond being a penal bond all liability upon same if in conformity with the statute would cease upon the death of the maker thereof and could only be a joint bond and not a joint and several bond.

17. The Court erred in not sustaining the general demur-er to plaintiff's petition in that the law requiring a bond and imposing penalties on retail liquor dealers requires them to give a bond for the pursuit of their business, but does not require a bond of any other merchant and is therefore violative of the bill of rights of the State of Texas, the sale of intoxicants being legalized in this State.

55 18. The Court erred in that it overruled the general demur-er to plaintiff's petition and submitted any question to the jury as to recovering a penalty for no penalty could be recovered or imposed in the State of Texas unless for an offense defined by the written laws of said State and for which a penalty is affixed by law and there is no statute in this State defining it as an offense for a minor to enter and remain in a saloon and it not being so defined as an offense no penalty can be imposed therefor by requiring the giving of a bond.

19. The Court erred in that it rendered judgment in this case against defendants, for that entering and remaining by W. W. Thompson in the saloon though repeated several times is only an infraction of one of the conditions of the bond and the State can only recover once for any infraction of any one condition of the bond.

20. The Court erred in that it rendered judgment upon said bond, for that said bond is void in that same embraces among its conditions the giving of intoxicating liquors as well as making it a penalty to permit a minor to enter and remain in such place of business of P. O. Cox, whereas the caption of the act does not embrace nor purport to regulate the giving to minors or the entering and remaining of minors in saloons and is violative of Section 35 Article 3 of the Constitution of the State of Texas in that it does not express in the caption the purpose of the act and thereby makes the bond more onerous than the legislature under said act had authority to require of a retail liquor dealer.

ORRICK & TERRELL AND
DEWEY LANGFORD,
Attys. for Defts. P. O. Cox,
Sam Levy & W. M. Evans.

No. 1336. The State of Texas *vs.* P. O. Cox *et al.* Assignments of Error. Filed June 15th, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co., Texas.

56 *Bill of Costs.*

No. 1336.

THE STATE OF TEXAS
vs.
P. O. COX ET AL.

Plaintiff and Defendant to Officers of Court, Dr. to Costs accrued in above entitled and numbered cause to:

Clerk's Costs.

1902.			
June		Filing Suit	.15
"		Docketing Cause	.20
"		Citation & 2 Copies to Tarrant Co.	1.75
"		" " 1 Copy to Hamilton	1.25
"		2 Copies of Petition	8.20
"	27	Filing Intgs.	.15
"	27	Commission to take Dep. of P. O. Cox	.75
"	27	Cert. Copy Intgs.	3.20
Aug.	11	Sub. 2 Witnesses	.25
"	23	" 5 "	.85
"	25	Filing Answers	.15
"	27	Sub. 2 Witnesses	.40
"	8	" 2 "	.40
"	18	4 Witness Certificates	2.00
"		Taxing Cost & 1 Copy	.25
1903.			
Mch.	Term	1 Cont.	.20
Sept.	"	1 "	.20
1903.			
Sept.	18	Filing 1 Paper	.15
"	19	2 Witness Certificates	1.00
"	16	Sub. 1 Witness	.25
1904.			
Feb.	24	Filing Intgs.	.15
"	24	Cert. Intgs. to P. O. Cox (2) Copies	2.50
"	24	Precept to serve & 2 Copies	1.75
"	26	2 Cert. Copies Intgs. to P. O. Cox D. & X.	3.90
"	26	Filing Cross Intgs.	.15
"	26	Commission to take Dep. of P. O. Cox	.75
		Amt. Ford	30.95

57 1904.

		Amt. Bro't For'd	30.95
Mch.	21	Filing 1 Paper	.15
"	22	" 1 "	.15
"	3	" 1st Amd. Ans.	.15
"	22	" 6 Papers	.90
"	25	" Motion for New Trial	.15

" 25	Docketing 1 Motion	.20
" 23	Final Judgment	1.00
" 23	Judgment Overruling Motion for New Trial	.75
" 22	6 Witness Certs	3.00
Apr. 12	Filing Statement of Facts	.15
" 13	" and Approving Bond	1.65
June 15	" Assignment of Errors	.15
" 17	Transcript of Record	$34.00
		$73.35

"Sheriff's Fees."

Serving Citation & Mileage	$ 1.50
" " " "	2.95
" Subpœna & "	2.70
" " 5 Witnesses	2.50
" " 2 " & Mileage	3.20
" " "	1.00
" " 1 "	.50
" Precept	.75
Jury Fee	.50
	$15.60

"Witness Fees."

J. T. Adams	5.64
J. E. Welch	5.64
Amt. Ford	$11.28
58 Amt. Brot. Ford	$11.28
W. W. Thompson	12.72
W. B. Thompson	12.72
W. W. Thompson	6.72
W. B. Thompson	6.72
W. B. Thompson	5.64
J. W. Newsome	1.00
J. A. Gamble	1.00
J. T. Adams	2.00
J. E. Welch	2.00
W. W. Thompson	5.64
	$67.24

Stenographer's Fee	$3.00

Recapitulation:

Clerk's Fees	$73.35
Sheriff's "	15.60

Witness "	67.24
Stenographer's Fee	3.00
Total	$159.19
By Cash (by Plff.)	104.84
Balance	854.35

Clerk's Certificate to Transcript.

THE STATE OF TEXAS, *County of Hamilton:*

I, R. C. Cornelius, Clerk of the District Court in and for the County of Hamilton, do hereby certify that the foregoing 56 pages contain a true and correct transcript of the record of all the proceedings had in this cause as the same appears of record and now on file in my office.

To certify which witness my hand and seal of this Court this the 17th day of June, A. D. 1904.

[SEAL.] R. C. CORNELIUS,
Clerk of the District Court of Hamilton County, Texas.

59 (Endorsed:) No. 3395. P. O. Cox *et al.* Appellants, *vs.* The State of Texas Appellee. From the District Court of Hamilton County. Applied for by D. Langford Attorney for Appellants on the 13th day of April, 1904, and delivered to D. Langford on the 17th day of June 1904. R. C. Cornelius Clerk. District Court Hamilton County. Filed in Court of Civil Appeals at Austin Texas, the 8th day of July 1904. R. H. Connerly, Clerk. Court of Civil Appeals 3rd Supreme Judicial District of Texas.

Opinion.

No. 3395.

P. O. COX ET AL., Appellants,
vs.
STATE OF TEXAS, Appellee.

Appeal from the District Court of Hamilton County.

This is a companion case to P. O. Cox *et al. vs.* W. B. Thompson, this day decided; and for the reasons stated in that case, the judgment in this case is affirmed.

Affirmed.

W. M. KEY,
Associate Justice.

(Endorsed:) With App. No. 4587. No. 3395 P. O. Cox *et al.*, Appellants, *vs.* State of Texas, Appellee. Appeal from Hamilton County. Opinion. Affirmed. Filed in Supreme Court Mar. 18 1905. F. T. Connerly, Clerk. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin Texas. Jan. 11, 1905. R. H. Connerly, Clerk. W. M. Key, Associate Justice.

60 *Judgment of the Court of Civil Appeals.*

Judgment of the Court of Civil Appeals, Rendered January 11th, 1905.

No. 3395.

P. O. COX ET AL.
vs.
THE STATE OF TEXAS.

Appeal from District Court of Hamilton County.

Opinion by Associate Justice Key.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the court that there was no error in the judgment; It is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee, the State of Texas do have and recover of and from the appellants P. O. Cox, Sam Levy and W. M. Evans, principals, and their sureties C. J. Swasey and W. J. Hefley the amount adjudged by the court below and all costs in this behalf expended, and this decision be certified below for observance.

Motion for Rehearing.

In the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin.

P. O. COX ET AL., Appellants,
vs.
THE STATE OF TEXAS, Appellee.

Now come the appellants herein and move the court to grant them a rehearing herein, and respectfully state to the court that as
61 grounds for rehearing these appellants assign the following to-wit:

1. The Court erred in holding that the Fourteenth assignment of Error was not well taken and in holding that the court below did not err in rendering judgment against the defendants, the appellants herein on the bond sued on, for that the law requiring the giving of the same is unconstitutional being violative of Section 1 Article 14 of the United States Constitution in that it is class legislation, and also violative of Article 3 of the Bill of Rights of the State of Texas.

2. The Court erred in holding that the First Assignment of Error was not well taken and in holding that the court below did not err in its charge to the jury in permitting and directing a recovery in favor of plaintiff, appellee herein, on any phase of the case on the finding by the jury on a preponderance of the evidence, in that the recovery

herein being a penalty and the action being one highly penal in its nature, it becomes and was necessary for the jury, in order to find for the plaintiff on any phase of the case presented to find the facts warranting such finding to exist from the evidence beyond a reasonable doubt.

3. The Court erred in holding that the Twelfth Assignment of Error was not well taken and in holding that the court below did not err in its charge in directing a recovery in favor of plaintiff, appellee herein, in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that under the charge in such case the entering must have been lawful and the recovery is permitted solely for unlawful remaining without unlawful entry.

4. The Court erred in holding that the Thirteenth Assignment of Error was not well taken in that it held that the court below did not err in its charge in directing a recovery in favor of plaintiff in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith, with the knowledge and consent of Cox, in that it not being unlawful for a minor to enter and remain in a saloon for a length of time sufficient to purchase a drink and
62 pay for same, if the saloon keeper sells the same in the belief that the minor is twenty one years of age and has good grounds for such belief, it must result that the legislature contemplated that entry and remaining under such circumstances were not violations of the bond, and that no recovery could be had for a remaining after entry under such circumstances.

5. The court erred in holding that the Eighteenth Assignment of Error was not well taken in that it held that the court below did not err in that it overruled defendant's general demur-er to the petition and submitted any question to the jury as to recovering a penalty, for no penalty could be recovered or imposed in the state of Texas unless for an offense defined by the written laws of said state and for which a penalty is affixed by law, and there is no statute in this state defining it as an offense for a minor to enter and remain in a saloon, and it not being so defined as an offense, no penalty can be imposed therefor by requiring the giving of a bond.

6. The court erred in holding that the Twentieth Assignment of Error was not well taken in that it held that the court below did not err in rendering judgment upon said bond, for that said bond is void in that same embraces among its conditions the giving of intoxicating liquors as well as making it a penalty to permit a minor to enter and remain in such place of business of P. O. Cox, whereas the caption of the act does not embrace nor purport to regulate the giving to minors or the entering and remaining of minors in saloons, and is violative of Section 35, Article 3, of the constitution of the State of Texas, in that it does not express in the caption the purpose of the act and thereby makes the bond more onerous than the legislature, under said act, had authority to require of a retail liquor dealer.

7. The Court erred in holding that the Second Assignment of Error was not well taken, in that it held that the court below did not err in the third paragraph of its charge and in the fourth paragraph

in so far as it is in connection with the third, in directing a verdict for plaintiff if the jury should find and believe from a preponderance of the evidence that the facts in said fourth and fifth para-
63 graphs set out existed, in so far as it submitted to the jury the issue as to whether or not P. O. Cox was, on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico, Hamilton County, Texas, in that there is absolutely no scintilla of evidence warranting the submission of such issue, there being no proof of any kind, character or description, by inference or otherwise, in the evidence that any license was ever issued by any person to the said P. O. Cox, or that he was a licensed retail dealer.

8. The court erred in holding that the Third Assignment of Error was not well taken in that it held that the verdict of the jury was not contrary to the law and without evidence to support it, in that there is absolutely no evidence or scintilla thereof that P O. Cox was ever a licensed retail liquor dealer in the city of Hico, Hamilton county, Texas, it appearing that no license was introduced in evidence and that no proof of any kind was made to supply the failure to introduce the license.

9. The court erred in holding that the Fourth Assignment of Error was not well taken in that it held that the court below did not err in directing a verdict for the plaintiff in any event under the evidence, for that there is no evidence or scintilla thereof going to show that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico.

10. The court erred in holding that the Eleventh Assignment of Error was not well taken in that it held that the court below did not err in permitting or directing a verdict in favor of the plaintiff herein in any event under the evidence, for that the evidence shows that the application made by P. O. Cox was for a license to do business at two separate and distinct places, and the allegation that license was issued to do business at the place in the application mentioned shows that the license was void upon its face even though the court should hold that it was not necessary to introduce the license in evidence or make proof that the license was issued.

11. The court erred in holding that the Fifth Assignment of Error was not well taken in that it held that the court below did not
64 err in the fourth paragraph of its charge, and in the fifth paragraph in so far as it is in connection with the fourth, in directing a verdict for plaintiff if the jury should find and believe from the preponderance of the evidence that the facts in said fourth and fifth paragraphs set out existed in so far as it submitted to the jury the issue as to whether or not P. O. Cox was, on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico, Hamilton County, Texas, in that it appears from the pleadings, the only place in which a license is mentioned, that a license was issued to P. O. Cox & Co., retail liquor dealers in Hico, Hamilton County, Texas, and while the pleadings allege that P. O. Cox was doing business under the name of P. O. Cox & Co., yet there is no scintilla of evidence to show or indicate that P. O. Cox was doing business under the name of P. O. Cox & Co. and in holding in substance that the

question raised by this assignment could not be raised on appeal because not sufficiently made in the court below.

12. The court erred in holding that the Sixth Assignment of Error was not well taken in that it in substance held that the verdict of the jury was not contrary to the law and the evidence, in that there is absolutely no evidence to show that P. O. Cox was doing business in the name of P. O. Cox & Co., there being no evidence or scintilla thereof upon the subject in the record and every inference in the record that can be drawn upon the subject going to show that P. O. Cox & Co. was a firm composed of at least two persons, and in holding in substance that the question presented by this assignment could not be raised on appeal because not sufficiently raised in the court below.

13. The court erred in holding that the Seventh Assignment of Error was not well taken in that it held that the court below did not err in its charge to the jury in assuming that P. O. Cox was doing business under the name of P. O. Cox & Co., for that there is absolutely no evidence in the record warranting the said assumption, and in that it held in substance that the question presented by this assignment could not be raised on appeal because not sufficiently raised in the court below.

14. The court erred in holding that the Sixteenth Assign-
65 ment of Error was not well taken in that it held that the Court below did not err in that it submitted any issue of liability upon the bondsmen and *and* the sureties in this case, for that the bond sued on is a statutory bond and is more onerous than same could be legally made, and is more onerous than is required by law, in that same is a joint and several obligation, and binds the maker and sureties thereon, jointly and severally, and their heirs, executors and administrators for the payment of same, whereas said bond being a penal bond all liability upon same if in conformity with the statute would cease upon the death of the maker thereof, and could only be a joint bond and not a joint and several bond.

15. The court erred in holding that the Eighth Assignment of Error was not well taken in that it held that the court below did not err in submitting to the jury, in its charge, continually and with reiteration the issue as to the entry of the said Thompson into the said saloon, with or without the consent of some person authorized to give consent, for that the court had erroneously permitted the father of the said Thompson to testify that he did not give his consent to the said entry, and the continued reiteration of the said issue had a tendency to direct the jury's mind unduly to the testimony of the father, and had a tendency to cause it to give undue weight to the fact that the entry was made without the consent of the father, and had a tendency to cause it to find for the plaintiff upon the issue of the entry and remaining to the injury of the defendant, and said issue, which was immaterial and irrelevant, was given undue prominence in the case, and there being no dispute as to the facts of the said issue, it, in its nature, must have injuriously affected the case of defendants before the jury.

16. The court erred in holding that the Ninth Assignment of Error was not well taken in that it held that the court below did not

err in its charge to the jury wherein the jury is instructed as to the form of its verdict if it found for plaintiff, in that the charge does not inform the jury as to the form of its verdict if it found for defendants, thereby probably leading the jury to infer or believe that the court thought that in no contingency could it find for the defendants.

66 The court erred in holding that the Tenth Assignment of Error was not well taken in that it held that the court below did not err in its charge in that same is contradictory and confusing, and in the nature thereof, undoubtedly affected injuriously the case of the defendants, in that — the fourth paragraph of its charge it instructs the jury directly to find for the plaintiff on the issue of entry and remaining, if they believe from the preponderance of the evidence that the defendant, Cox or his agents, permitted W. W. Thompson to enter and remain in his house or saloon, wherein he was conducting the business of a retail liquor dealer, if the said Thompson was then and there under the age of twenty one years, this paragraph being short, concise and complete within itself and without qualification. And in the fifth paragraph of the court's charge, which is quite lengthy, the court undertakes, in some measure to avoid the effect of the fourth paragraph by charging the jury, amongst other things, that if the jury believes from the evidence that the said Thompson entered the said saloon for the purpose of procuring intoxicating liquors, and that the same were sold to him, and that the persons selling the same did so in good faith believing him to be twenty one years of age and having good grounds for such belief, and that said Thompson did not remain in said saloon for a longer time than was necessary, under the circumstances, to procure said liquor, that is to purchase, drink and pay for same, that it should find for the defendant, but in the same paragraph of the same charge the converse of the proposition is given, making the fifth paragraph of the charge a complete charge in itself upon all phases of the entry and remaining that could be submitted in this case, and making it a complete exposition of the law of the same unless another assignment of error that we make herein should be well taken, and said fifth paragraph uses no words purporting to qualify the fourth paragraph. The effect of the two charges is such that an absolute and positive irreconcilable conflict exists. The third paragraph directs a recovery absolutely without reference to any excuse, and the fourth paragraph directs a recovery conditionally, and deals with all phases of the situation. The contradiction and confusion are still further accentuated by the giving of

67 the special charge asked by the defendants, wherein the jury is told that a recovery can be had for but one infraction of the bond at one time.

18. The court erred in holding that the Nineteenth Assignment of Error was not well taken in that it held that the court below did not err in rendering judgment in this case against defendants, for that entering and remaining by W. W. Thompson, in the saloon, though repeated several times, is only an infraction of one of the

conditions of the bond, and the state can only recover once for any infraction of any one condition of the bond.

Wherefore for the manifest errors in the judgment of this honorable court the appellants respectfully pray that a rehearing be granted. And appellant would respectfully state to the court that the attorneys for the appellee herein are Maine & Chesley whose post-office address is Hamilton in Hamilton County, Texas, and they pray that notice of this motion be duly served on them as required by law, and that on hearing that a rehearing be granted herein as herein prayed by appellants.

DEWEY LANGFORD,
ORRICK & TERRELL,
Attorneys for Appellants.

(Endorsed:) Mo. 2105 P. O. Cox *et als. vs.* State of Texas. Appellants' Motion for Rehearing. With App. No. 4587. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Jan. 23, 1905. R. H. Connerly, Clerk. Filed in Supreme Court, Mar. 18, 1905. F. T. Connerly, Clerk.

Order Overruling Motion for Rehearing.

Order Made February 22nd, 1905.

Overruling Motion for Rehearing.

Motion 2105, No. 3395; P. O. Cox *et al vs.* State of Texas; Appeal from Hamilton County; Motion for Rehearing: The Motion is overruled.

68 *Application for Writ of Error.*

In the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin.

P. O. COX ET AL., Appellants,
vs.
THE STATE OF TEXAS, Appellee.

Now come the appellants herein and apply to the Honorable Supreme Court of the State of Texas for the issuance of its writ of error to the said honorable Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas, for that said Honorable Court of Civil Appeals in affirming the above styled cause committed manifold errors, which errors were duly called to the attention of said court on motion for rehearing, which said motion was by said court duly overruled. And the appellants herein would respectfully call to the attention of the Honorable Supreme Court and assign as error the action of said Honorable Court of Civil Appeals in the following particulars, to-wit:

1. The court erred in holding that the Fourteenth Assignment of Error was not well taken and in holding that the court below did not err in rendering judgment against the defendants, the appellants herein, on the bond sued on, for that the law requiring the giving of the same is unconstitutional being violative of Section 1 Article 14 of the United States Constitution in that it — class legislation, and also violative of Article 3 of the Bill of Rights of the State of Texas.

This is the companion case of the case of Cox *vs.* Thompson for which a writ of error is at this time being applied for.

In view of the very meager statement of the Court of Civil Appeals and the very short statement of facts that can be made to cover the whole case, we deem it proper for the convenience of the court to make the following short statement of the material facts in the case

69 There was absolutely no evidence that P. O. Cox was doing business under the firm name of P. O. Cox & Co., direct, indirect or inferential.

There was absolutely no evidence that P. O. Cox or P. O. Cox & Co. ever obtained a license to retail liquors, either direct, indirect or inferential.

The application was put in evidence and will be referred to under proper assignment.

The bond was introduced. It was the ordinary form of liquor bond except the place of business is left blank, and was a joint and several obligation, binding the heirs, executors and administrators of the principal and sureties. The plaintiff's evidence showed that, as a matter of fact, Thompson was a minor, and that he did not consent for defendant to sell to his son or to permit his son to enter and remain in the saloon.

That at the times alleged said minor did enter and remain as many as three or more times, and bought drinks and got intoxicated.

The evidence would warrant the conclusion of the jury that the minor loitered some minutes after taking his drinks.

The evidence of the defendants would have warranted a finding by the jury that the drinks were sold in good faith, and would have warranted a finding that his entering and remaining was for the purpose of getting drinks and that he did not loiter.

The evidence is voluminous but we think we have stated enough in our short summary for the court to grasp the case in the beginning, and hence omit all reference to detail and questions of credibility.

We think also that the charge of the court in so far as it is material to the questions involved should be set before the court, and in view of the fact that the said charge is set forth in full on page 4 *et seq.* of the brief, we think it will be more convenient for the court to read it as printed than to have it add- to the volume of this motion.

We would call the court's attention to our argument upon this proposition on page 44 *et seq.* of our brief in this cause as
70 well as also our argument on page 7 *et seq.* of the supplemental brief filed herein, and we feel that in addition to these arguments we ought to make to the court the following additional suggestions by way of argument.

In making this argument we recognize that this court has held in the case of Douthit *vs.* State that the case attempted here to be made is governed by the case of the American Sugar Refining Co. *vs.* Louisiana reported in the 176 U. S. page 89, and that this case is analogous to that and that the case of Connolly *vs.* Union Sewer Pipe Co. reported in the 184 U. S. page 640 does not govern.

Why this is so this honorable court in its opinion did not undertake to show.

In view of the fact that we cannot bring ourselves to believe that on a reconsideration of the questions involved that this court will finally hold the law to be as it did in the Douthit case, we feel constrained in this writ of error to make a few suggestions to the court, hoping that these suggestions in addition to the argument made in our briefs will present the point to the court in a new light.

In the first place we understand the law is that; by reason of our constitution every man enjoys the right to pursue the business of a retail liquor dealer as much so as the right to sell dry goods, where local option has not been put in force in the manner authorized by the constitution.

If this were not so, yet nevertheless the Supreme Court of the United States in two cases, to-wit Vance *vs.* W. A. Vandacook Co., 170 U. S. page 438 and Scott *vs.* McDonald, 165 U. S. 58-107 holds that the liquor traffic comes within the domain of trade and commerce and as such is entitled to the protection afforded by the constitution of the United States to trade and commerce.

With this preliminary statement, we would call the court's attention to the fact that if a parallel can be drawn between the Sugar Refining Co. case and this case it would seem that the parallel could only be drawn along the lines of the dissenting opinion of Mr. Justice McKenna in the Connolly case, and he does not undertake to point out in any clear manner how the two cases can be
71 parallel, nor does this court in anyway whatever point out where the parallel exists.

The consideration of the Sugar Refining Co. case shows that it was an act to levy, collect and enforce payment of an annual license tax on certain persons. That it had in view no other purpose than the purpose of taxation expressed in its title.

The exemption in that act applied to planters and farmers grinding and refining their own sugar and molasses and those who granulated syrup for other planters during the rolling season. The opinion in that case makes a distinction which can well be applied in this case and so nearly does it touch the identical question here raised, that we can truthfully say that were we now attacking our statute regulating the sale of intoxicating liquors only in so far as its features relating to taxation are concerned, that the exact question on which the distinction was made in the Sugar Refining Co. case would exist here. The decision in that case says, "The act is not only exempting planters who use their sugar in the manufacture of articles of a wholly different description such as confectionery, preserves or pastry or such as one which would exempt the farmer who devoted his corn or rye to the making of whiskey, while other manu-

facturers of these articles were subject to the tax. A somewhat different question might arise in such a case."

If in our attack upon the act involved in this case we had no other point of distinction between this case and the Sugar Refining Co. case, we think that a good point would be made, and that the very point having been suggested by the Supreme Court of the United States itself in the very case would be entitled, if not absolutely good, at least to the most careful consideration and that the profession would be entitled to have the reasons why such point did not constitute a good distinction pointed out to it. We know that there is no rule of law requiring this court to give its reasons for any of its decisions, but we believe that long custom and practice by the Judges of the Court has established something nearly akin to the rule for which we contend.

Whether the point suggested in the Sugar Refining Co. case is a good one or not, yet the vastness of the distinction between
72 that case and this, in our humble opinion, should be at once apparent to an appellate court, unless they follow the reasoning of Justice McKenna to the exclusion of the majority of the Supreme Court of the United States.

In the Sugar Refining Co. case it should be borne in mind that the basic principles upon which that case was decided are two. First, that it was purely a revenue act. Second, that from time out of mind it has been the policy of this government not only to classify for purposes of taxation, but to exempt producers from taxation of the methods employed by them to put their products upon the market.

It should also be borne in mind that that case itself goes on to point out that refined sugar is a natural and ultimate product of the cane and the various steps dealt with in the act are merely taken to perfect such product and are but incident to its original growth.

The gist of that decision is contained entirely in the foregoing semi quotation. Now wherein is it in any way analogous to this case?

Here we have an act which is entitled "An act to regulate the sale of spirituous, vinous or malt liquors or medicated bitters, to fix a tax upon all persons or association- of persons selling such liquors, to define the time and manner of collecting such tax, to fix penalties for the violations of this act, etc." First, the main purpose of the act is obviously a regulation of the liquor traffic. Second, the tax is imposed as an incident or step in the regulation.

In regulating the sale of liquors the most *or* stringent provisons are made, including amongst other things the requiring of a bond as the bond herein sued on, on which causes of action may arise to the extent of five thousand dollars on penalties, that is fines. This bond, it is useless for us to say, is most burdensome in its provisions and conditions as well as is also the act in many other particulars.

Now the question arises. Is an act providing for the regulation of a business in any way different from an act providing for the imposition of a license tax? It would certainly seem to us that if
73 the answer is not at once plainly apparent, the answer of the Supreme Court of the United States in the Connolly case would forever settle this question.

The Illinois anti-trust act was an act more nearly on a parallel with this case than was the Sugar Refining Co. case, for it regulated and penalized the doing of certain business in certain ways and had an exemption clause almost in exact terms like the exemption clause in our statute, and the language of the Supreme Court of the United States in dealing with that anti-trust act is in all of its parts so applicable to the question here presented that we feel that we would do our client an injustice did we not strongly urge upon this court a reconsideration of its expressed idea on the subject in the Douthit case.

There is in this case absolutely nothing which is similar to the Sugar Refining Co. case except the fact that a license tax is in both imposed and that omitting from our argument the taxation feature as we have not undertaken to attach the statute as unconstitutional in so far as it imposed the tax, we think that the only point of similarity has been entirely eliminated and leaves the two cases, to-wit this Sugar Refining Co. case, absolutely and utterly different cases in principle. If not, we have yet to see any reason pointed out in any opinion of any court which even with plausibility undertakes to show wherein the similarity exists.

It had occurred to us that the only two points upon which counsel could base an argument to sustain the constitutionality of the statute under consideration were, first, that the liquor traffic did not come within the domain of trade and commerce. Second, that the regulations contained in the act are within the police powers of the state to such an extent that they would not be interferred with by the Federal Courts. Both of these points can be sustained by citation of abundant authorities, and we would approach a submission of this question to this court with great fear as to the ultimate result were it not that upon both questions the Supreme Court of the United States, which is our court of last resort, has spoken in no un-
74 certain terms and in language that cannot be misunderstood.

The South Carolina cases hereinbefore cited absolutely dispose of the first question whatever may be the decision of other courts .n the United States or other decisions of the Supreme Court of the United States. The South Carolina cases are the latest utterances on the subject and until overruled constitute the law of the land in so far as an interpretation of the United States Constitution is concerned with reference to what comes within the domain of trade and commerce. Second, the Connolly case deals with the question of police power so clearly that he who runs may read, and in the face of that case it would unquestionably be far fetched to say that the exception herein complained of by reason of the police power vested in the state did not bring the statute in conflict with the constitution of these United States.

It may be that we are obtuse in being unable to accept as satisfactory to our minds the decision in the Douthit case, but we have not, and as no reasons were given by this court in that decision for its decision, so we are unable to suggest to our minds any satisfactory reason which occurred to the court for holding that that case, towit the Douthit case, was governed by the principles decided in the Sugar Refining Co. case.

We submit that as this court in the Shippers Compress Co. case felt bound to follow the Supreme Court of the United States in so far as the imposition of penalties under the anti-trust act was concerned, we would suggest that however much this court may be of opinion that the Connolly case is wrong in principle, which is evidently its opinion, yet they should accept it as the law of the land and from it as the law they should deduce their conclusions in dealing with cases of this class. We know that vagaries some time arise where courts accept as law decisions which they believe not to be the law, as for instance our decisions holding that the superior title is in the vendor of land sold on credit, but nevertheless as there, it sometimes becomes necessary for courts to accept those decisions as law which they do not believe to be the law, and we think now
75 that one of those occasions has arisen and that this court should accept the Connolly case as the law and apply the language used in that case to the points raised in this in an endeavor to keep as far as possible the decisions of our state from getting in such lamentable shape that no mind however great can reconcile them.

This is bound to be the result if in great questions like this we are compelled to accept the mere statement of the court that a proposition made comes within the principles decided in a certain case, when to our mind it is a matter of utter impossibility to figure out how such a proposition comes within such a case.

We insist so earnestly upon this point because so thoroughly are we convinced that we are right that until the question has been passed upon the very last court to which it can be taken under the law of the land, we shall not be satisfied and we deem it our duty to present to this court every argument that has occurred to us in order that it may have the same lights before it as the Supreme Court of the United States which must and will ultimately be called upon to decide this question.

2. The court erred in holding that the First Assignment of Error was not well taken and in holding that the court below did not err in its charge to the jury in permitting and directing a recovery in favor of plaintiff, appellee herein, on any phase of the case on a finding by the jury on a preponderance of the evidence in that the recovery herein being a penalty and the action one highly penal in its nature, it becomes and was necessary for the jury, in order to find for the plaintiff on any phase of the case presented, to find the facts warranting such finding to exist from the evidence beyond a reasonable doubt.

We would call the court's attention to our statement and argument upon this proposition on page 8 *et seq.* of our brief in this cause as well as also pages 6 and 7 of the supplemental brief filed herein. We would particularly call the attention of the court to the argument upon this proposition.

3. The court erred in holding that the Twelfth Assign-
76 ment of Error was not well taken and in holding that the court below did not err in its charge in directing a recovery

in favor of plaintiff, appellee herein, in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that under the charge in such case the entering must have been lawful and the recovery is permitted solely for unlawful remaining without unlawful entry.

We would call the court's attention to our argument upon this proposition on page 19 of our brief in this cause. We would particularly call the attention of the court to the argument upon this proposition.

4. The court erred in holding that the Second Assignment of Error was not well taken, in that the court below did not err in the third paragraph of its charge and in the fourth paragraph in so far as it is in connection with the third, in directing a verdict for plaintiff if the jury should find and believe from a preponderance of the evidence that the facts in said fourth and fifth paragraphs set out existed, in so far as it submitted to the jury the issue as to whether or not P. O. Cox was, on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico, Hamilton County, Texas, in that there is absolutely no scintilla of evidence warranting the submission of such issue, there being no proof of any kind, character or description by inference or otherwise, in the evidence that any license was ever issued by any person to the said P. O. Cox, or that he was a licensed retail dealer.

We would call the court's attention to our statement and argument upon this proposition on page 12 *et seq.* of our brief in this cause.

We would call the court's particular attention to our argument bearing on this and the next five assignments of error on page 2 *et seq.* of our supplemental brief filed herein.

5. The court erred in holding that the Third Assignment of Error was not well taken in that it held that the verdict of the jury was not contrary to the law and without evidence to support it, in that there is absolutely no evidence or scintilla thereof that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico, Hamilton
77 County, Texas, it appearing that no license was introduced in evidence and that no proof of any kind was made to supply the failure to introduce the license.

We would call the court's attention to our argument upon this proposition on page 14 of our brief in this case.

6. The court erred in holding that the Fourth Assignment of Error was not well taken in that it held that the court below did not err in directing a verdict for the plaintiff in any event under the evidence, for that there is no evidence or scintilla thereof going to show that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico.

We would call the court's attention to our argument upon this proposition on pages 14 and 15 of our brief in this cause.

7. The court erred in holding that the Fifth Assignment of Error was not well taken in that it held that the court below did not err in the fourth paragraph of its charge, and in the fifth paragraph in so far as it is in connection with the fourth, in directing a verdict for

laintiff if the jury should find and believe from the preponderance f the evidence that the facts in said fourth and fifth paragraphs set ut existed in so far as it submitted to the jury the issue as to whether r not P. O. Cox was, on or about the 30th day of May, 1902, a censed retail liquor dealer in Hico, Hamilton County, Texas, in that t appears from the pleadings, the only place in which a license is mentioned, that a license was issued to P. O. Cox & Co., retail liquor dealers in Hico, Hamilton County, Texas, and while the pleadings llege that P. O. Cox was doing business under the name of P. O. Cox & Co., yet there is no scintilla of evidence to show or indicate hat P. O. Cox was doing business under the name of P. O. Cox & Co. nd in holding in substance that the question raised by this assignment could not be raised on appeal because not sufficiently made in he court below.

We would call the court's attention to our statement and argument upon this proposition on page 25 of our brief in this cause.

8. The court erred in holding that the Sixth Assignment of
78 Error was not well taken in that it in substance held that the verdict of the jury was not contrary to the law and the evidence, in that there is absolutely no evidence to show that P. O. Cox was doing business in the name of P. O. Cox & Co., there being no evidence or scintilla thereof upon the subject in the record and every inference in the record that can be drawn upon the subject going to show that P. O. Cox & Co. was a firm composed of at least two persons, and in holding in substance that the question presented by this assignment could not be raised on appeal because not sufficiently raised in the court below

We would call the court's attention to our statement and argument upon this proposition on pages 25 to 27 of our brief in this cause.

9. The court erred in holding that the Seventh Assignment of Error was not well taken in that it held that the court below did not err in its charge to the jury in assuming that P. O. Cox was doing business under the name of P. O. Cox & Co., for that there is absolutely no evidence in the record warranting the said assumption, and in that it held in substance that the question presented by this assignment could not be raised on appeal because not sufficiently raised in the court below.

We would call the court's attention to our statement and argument upon this proposition on page 26 *et seq.* of our brief in this cause.

10. The court erred in holding that the Eighth Assignment of Error was not well taken in that it held that the court below did not err in submitting to the jury, in its charge, continually and with reiteration, the issue as to the entry of the said Thompson into the said saloon, with or without the consent of some person authorized to give consent, for that the court erroneously permitted the father of the said Thompson to testify that he did not give his consent to the said entry, and the continued reiteration of the said issue had a tendency to direct the jury's mind unduly to the testimony of the father, and had a tendency to cause it to give undue weight to the

fact that the entry was made without the consent of the father, and had a tendency to cause it to find for the plaintiff upon the issue of the entry and remaining, to the injury of the defendant, and
79 said issue, which was immaterial and irrelevant, was given undue prominence in the case, and there being no dispute as to the facts of the said issue, it, in its nature, must have injuriously affected the case of defendants before the jury.

We would call the court's attention to our statement and argument upon this proposition on pages 15 and 16 of our brief in this cause.

11. The court e-red in holding that the Ninth Assignment of Error was not well taken in that it held that the court below did not err in its charge to the jury wherein the jury is instructed as to the form of its verdict if it found for plaintiff, in that the charge does not inform the jury as to the form of its verdict if it found for defendants, thereby probably leading the jury to infer or believe that the court thought that in no contingency could it find for the defendants.

We would call the court's attention to our statement and argument upon this proposition on page 17 of our brief in this cause.

12. The court erred in holding that the Tenth Assignment of Error was not well taken in that it held that the court below did not err in its charge in that same is contradictory and confusing, and in the nature thereof, undoubtedly affected injuriously the case of the defendants, in that the fourth paragraph of its charge it instructs the jury directly to find for the plaintiff on the issue of entry and remaining, if they believed from the preponderance of the evidence that the defendant, Cox, or his agents, permitted W. W. Thompson to enter and remain in his house or saloon, wherein he was conducting the business of a retail liquor dealer, if the said Thompson was then and there under the age of twenty-one years, this paragraph being short, concise and complete within itself and without qualification. And in the fifth paragraph of the court's charge, which is quite lengthy, the court undertakes, in some measure, to avoid the effect of the fourth paragraph by charging the jury, amongst other things, that if the jury believes from the evidence that the said Thompson entered the said saloon for the purpose of procuring intoxicating liquors, and that the same were sold to him, and that the person selling the same did so in good faith, believing
80 him to be twenty-one years of age and having good grounds for such belief, and that said Thompson did not remain in said saloon for a longer time than was necessary, under the circumstances, to procure said liquor, that is, to purchase, drink and pay for same, that it should find for the defendant, but in the same paragraph of the same charge the converse of the proposition is given, making the fifth paragraph of the charge a complete charge in itself upon all phases of the entry and remaining that could be submitted in this case, and making it a complete exposition of the law of the same unless another assignment of error that we make herein should be well taken, and said fifth paragraph uses no words purporting to qualify the fourth paragraph. The effect of the two charges is such that an absolute and positive irreconcilable conflict

ists. The third paragraph directs a recovery absolutedy without ference to any excuse, and the fourth paragraph directs a recovery nditionally, and deals with all phases of the situation. The con- adiction and confusion are still further accentuated by the giving f the special charge asked by the defendants, wherein the jury is ld that a recovery can be had for but one infraction of the bond one time.

We would call the court's attention to our statement and argument on this proposition on page 29 *et seq.* of our brief in this cause.

13. The court erred in holding that the Eighteenth Assignment f Error was not well taken in that it held that the court below did ot err in that it overruled defendant's general demur-er to the peti- ion and submitted any question to the jury as to recovering a enalty, for no penalty could be recovered or imposed in the state of exas unless for an offense defined by the written laws of said state nd for which a penalty is affixed by law, and there is no statute in his state defining it as an offense for a minor to enter and remain in saloon, and it not being so defined as an offense, no penalty can be mposed therefor by requiring the giving of a bond.

We would call the court's attention to our statement and argu- ment upon this proposition on page 35 *et seq.* of our brief in this ause.

14. The court erred in holding that the Twentieth As-
81 signment of Error was not well taken in that it held that the court below did not err in rendering judgment upon said bond, for that said bond is void in that same embraces among its conditions the giving of intoxicating liquors as well as making it a penalty to permit a minor to enter and remain in such place of business of P. O. Cox, whereas the caption of the act does not em- brace nor purport to regulate the giving to minors or the entering and remaining of minors in saloons, and is violative of Section 35, Article 3, of the Constitution of the State of Texas, in that it does not express in the caption the purpose of the act and thereby makes the bond more onerous than the legislature, under said act, had authority to require of a retail liquor dealer.

We would call the court's attention to our statement and argument upon this proposition on page 41 *et seq.* of our brief in this cause.

15. The court erred in holding that the Thirteenth Assignment of Error was not well taken in that it held that the court below did not err in its charge in directing a recovery in favor of plaintiff in case the minor loitered in the saloon after purchasing and paying for the drinks sold him in good faith, with the knowledge and consent of Cox, in that it not being unlawful for a minor to enter and remain in a saloon for a length of time sufficient to purchase a drink and pay for same, if the saloon keeper sells the same in the belief that the minor is twenty-one years of age and has good grounds for such belief, it must result that the legislature contemplated that entry and remaining under such circumstances were not violations of the bond, and that no recovery could be had for a remaining after entry under such circumstances.

We would call the court's attention to our statement and argu- ment upon this proposition on page 21 of our brief in this cause.

16. The court erred in holding that the Eleventh Assignment of Error was not well taken in that it held that the court below did not err in permitting or directing a verdict in favor of the plaintiff herein in any event under the evidence, for that the evidence shows that the application made by P. O. Cox was for a license to do business at two separate and distinct places, and the allegation that
82 license was issued to do business at the place in the application mentioned shows that the license was void upon its face even though the court should hold that it was not necessary to introduce the license in evidence or make proof that the license was issued.

We would call the court's attention to our statement upon this proposition on page 19 of our brief in this cause.

17. The court erred in holding that the Sixteenth Assignment of Error was not well taken in that it held that the court below did not err in that it submitted any issue of liability upon the bondsmen and the sureties in this case, for that the bond sued on is a statutory bond and is more onerous than same could be legally made, and is more onerous than is required by law, in that same is a joint and several obligation, and binds the maker and sureties thereon, jointly and severally, and their heirs, executors and administrators for the payment of same, whereas said bond being a penal bond all liability upon same if in conformity with the statute would cease upon the death of the maker thereof, and could only be a joint bond and not a joint and several bond.

We would call the court's attention to our statement and argument upon this proposition on page 32 of our brief in this cause.

18. The court erred in holding that the Nineteenth Assignment of Error was not well taken in that it held that the court below did not err in rendering judgment in this case against defendants, for that entering and remaining, by W. W. Thompson, in the saloon, though repeated several times, is only an infraction of one of the conditions of the bond, and the state can only recover once for any infraction of any one of the conditions of the bond.

We would call the court's attention to our statement and argument upon this proposition on page 38 *et seq.* of our brief in this cause.

And now having pointed out to the court the manifold and manifest errors of the honorable Court of Civil Appeals, appellants pray that the honorable Supreme Court will grant them a writ of error in this cause and reverse and render or remand the case as to it
83 may seem proper.

Appellants would state that the attorneys for the appellee are Maine & Chesley whose postoffice address is Hamilton, Texas.

DEWEY LANGFORD,
ORRICK & TERRELL,
Attorneys for Appellants.

(Endorsed:) App. No. 4587. P. O. Cox *et als. vs.* State of Texas. Application for writ of Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Mar. 15, 1905. R. H.

Connerly, Clerk. Filed in Supreme Court, Mar. 18, 1905. F. T. Connerly, Clerk. By J. S. Myrick, Deputy. Refused Orrick & Terrell.

Clerk's Office, Supreme Court.

I, F. T. Connerly, clerk of the Supreme Court of Texas, hereby certify that the above and foregoing 15 pages contain a true and correct copy of the petition for writ of error filed in this Court by P. O. Cox in application No. 4587, P. O. Cox *et als. vs.* The State of Texas.

Witness my hand and the seal of said Court, this the 10th day of April, A. D. 1905.

[SEAL.] F. T. CONNERLY, *Clerk.*

(Endorsed:) Filed in Court of Civil Appeals, Third Supreme Judicial District, Austin, Texas, Apr. 10, 1905. R. H. Connerly, Clerk.

Judgment of Supreme Court.

In Supreme Court of Texas, Third District.

P. O. COX ET AL.
vs.
STATE OF TEXAS.

MARCH 23RD, 1905.

This day came on to be heard the application of P. O. Cox *et al.* for a writ of error to the Court of Civil Appeals for the Third
84 District, and the same having been duly considered, it is ordered that said application be refused; that the applicants, P. O. Cox, Sam Levy and W. M. Evans and their Sureties W. J. Hefley and C. J. Swasey, pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said court, this the 8th day of April A. D. 1905.

[SEAL.] F. T. CONNERLY, *Clerk,*
By J. S. MYRICK, *Deputy.*

(Endorsed:) Application No. 4587. P. O. Cox *et al. vs.* State of Texas. Copy of Judgment in Supreme Court. Application for Writ of Error Refused. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Apr. 8, 1905. R. H. Connerly, Clerk.

Bill of Costs.

Clerk's Office, Supreme Court.

No. 4587.

P. O. COX ET AL.
vs.
STATE OF TEXAS.

Certified Copy Bill of Costs, Supreme Court.

Filing Application	.50
Docketing Petition	.50
Entering Appearance of Counsel	.50
Filing two Briefs	.60
Filing Three Papers	.90
Entering Orders	.50
Entering Judgment on Application	1.00
Certified Copy of Judgment	1.00
Taxing Costs of Application	.50
Certified Copy Bill of Costs	1.00
Total	$7.00

85 I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and seal of said Court, at Austin, this the 8th day of April, 1905.

[SEAL.] F. T. CONNERLY, *Clerk.*

(Endorsed:) Application. No. 4587. Certified copy Bill of Costs in Supreme Court, Austin. P. O. Cox *et al. vs.* State of Texas. $7.00 Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Apr. 8, 1905. R. H. Connerly, Clerk.

Petition for Writ of Error.

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. COX ET AL., Plaintiffs in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

To the Honorable H. C. Fisher, Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas:

Your petitioners, P. O. Cox, Sam Levy and W. M. Evans, respectfully show that heretofore to-wit on the 22nd day of March, 1904

there was tried in the District Court of Hamilton County, Texas in the town of Hamilton, County of Hamliton, State of Texas, a case in which the State of Texas was plaintiff and P. O. Cox, Sam Levy and W. M. Evans were defendants.

The declaration of the plaintiff in said cause was a petition for the recovery of penalties against P. O. Cox as principal and Sam Levy and W. M. Evans as sureties for the violation by P. O. Cox of the conditions of his bond as a retail liquor dealer, namely in that he allowed W. W. Thompson, minor son of W. B. Thompson,

86 to enter and remain in his house or place of business for the selling of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, 6 times on the 30th day of May, 1902. And also for selling and giving to W. W. Thompson, minor son of W. B. Thompson, six times intoxicating liquors upon said date and to recover the sum of $500 as a penalty for each time he entered and remained and $500 as a penalty for each sale or gift that was made to him of intoxicating lipuors in said place of business for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to be drunk upon the premises, a copy of which said laws and amendments thereto under which said suit was brought is hereto attached and marked Exhibit A. It also alleged that Cox was a duly licensed dealer and that his bond was given as required by law, said bond being the bond sued on.

Upon the trial of said cause in said city, your petitioners demurred both generally and specially, to plaintiff's said petition upon the following grounds among others to-wit:

A general demurrer, and special demurrer, because the act under which said suit was brought and under which said bond was required to be executed, was unconstitutional and violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States; because same was class legislation and that it denied to the plaintiffs in error that protection of the laws given to other persons similarly situated in the state; because it deprived plaintiffs in error of their property without due process of law, for that under the statutes of the state of Texas it is provided that no person shall be punished in the State of Texas for any act or omission unless same is made a penal offense and a penalty affixed thereto by the written laws of the state and the recovery sought to be had was a recovery upon the bond that was a penalty and for an act or omission which was not defined by the statutes of the state of Texas and for the violation of which no penalty was affixed by the laws of the state of Texas; because the provisions of the act cast special burdens and penalties upon those engaged in the sale of wines made from other fruits than grapes and wines made from grapes not grown in the

87 State of Texas and wines made from grapes grown in the state of Texas while not in the hands of the manufacturer or producer thereof, as distinguished from those engaged in the sale of wines made from grapes grown in Texas while in the hands of the producer or manufacturers thereof, also because said act granted special privileges to the manufacturers or wines made

from grapes grown in the state of Texas while in the hands of the manufacturer or producer thereof as contra-distinguished from other people engaged in the handling of wines made from other fruits than grapes grown in the state of Texas while in the hands of the manufacturer or producer thereof and of wines made from grapes grown in the state of Texas while not in the hands of the manufacturer or producer thereof; because said act requiring such bond and prescribing penalties for the violation of its conditions in *in* effect deprives plaintiffs in error of their property without due process of law.

Which said demurrer was overruled and the case was tried and submitted to the jury on the charge of the court, and that thereafter on the 23 day of March 1904 a verdict was returned in said cause against the defendants finding three infractions of the bond by entering and remaining and assessed the damages at $500 for each entry and remaining, and judgment was accordingly entered against the defendants for $1500 and costs.

And thereupon said defendants who allege and represent to this court that they are citizens of the United States and of the State of Texas appealed from the decision of the said court to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, in which court among other things, it was assigned as error that the court below had erred in overruling defendants' general demurrer to the said petition and in submitting any question to the jury as to the recovering a penalty for the violating the conditions *if* said bond for that no penalty could be recovered or imposed in the State of Texas unless for an offense defined by the written laws of said state and for which a penalty is affixed by law, and that there was no statute in the state defining it as an offense for a minor to enter and remain in the saloon and no penalty could be im-
88 posed and recovered therefor by requiring the giving of a bond. And also assigned for error that the court erred in giving judgment against defendant on said bond, for that the law requiring the giving of the same and giving a recovery thereon is *in*constitutional being violative of Section 1 Article 14 of the United States Constitution, and by appropriate propositions thereunder raised the question of the constitutionality of said act as tested by the Constitution of the United States Section 1 Article 14 of the Amendment thereto.

That upon the trial of the said cause in the Court of Civil Appeals for the Third Supreme Judicial District of Texas, the judgment of said court below was affirmed and the objections urged against the validity of the statute requiring retail liquor dealers to give bond in the manner prescribed by the statute were considered and all overruled, and especially the one which urged that the statute referred to is obnoxious to the Fourteenth Amendment of the Federal Constitution as construed in the case of Connolly *vs.* Union Sewer Pipe Co. by the Supreme Court of the United States. That by said court is was adjudged that the provisions of Chapter A -1 Title CIV of the Revised Statutes of the State of Texas and the amendments thereto Chapter 158 of the Acts of the Legislature of 1897 of the general laws

of said state which made it unlawful for any person to engage in the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to be drunk on the premises, until he should pay the occupation tax levied under said law and enter into a bond in the sum of five thousand dollars with at least two good, lawful and sufficient sureties payable to the state of Texas, and to be approved by the County Judge, conditioned that said person, firm or association of persons so selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication in any quantity to be drunk on the premises, shall keep an open, quiet and orderly house or place for the sale of spirituous, vinuous or malt liquors or medicated bitters capable of producing intoxication, that such person, firm or association of persons or his agent or employé will not
89 sell or permit to be sold in his or their place of business, nor give or permit to be given, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication to any person under the age of twenty-one years, or to a student of any institution of learning or to any habitual drunkard or to any person after being notified in writing through the sheriff or other peace officer by the wife, mother, daughter or sister of the said person not to sell to such person, and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business, and also further conditions not involved in this case which appear fully from an inspection of the copy of said act which is attached hereto and made a part hereof and which acts provide a penalty of $500 for the infraction of each of the conditions of said bond.

Art. 506001, of said act, however, exempts from the provisions of said act all persons selling wines manufactured from grapes grown in Texas while in the hands of the manufacturers or producers thereof, was a good and valid law and was not obnoxious to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

That said Court of Civil Appeals in effect held that same was not in conflict with the provisions of Section 1 of the Fourteenth Amendment of the Federal Constitution, in that the provisions of said act did not deprive citizens of the United States and of the State of Texas of rights, privileges and immunities secured to other citizens of the United States and of the State of Texas, nor of liberty or property without due process of law, nor of the equal protection of the law, all of which appears in the record, opinion and final judgment of the said Court of Civil Appeals affirming the judgment of the District Court of Hamilton County, Texas.

Your petitioners represent and show to the court that on the 15th day of March, 1905 a petition for a writ of error was filed in the said Court of Civil Appeals to the Supreme Court of the State of Texas and filed in the Supreme Court on March 18, 1905, and that in which said petition for writ of error said above mentioned questions were fully raised and discussed, and that the said Supreme Court
90 on the 22nd day of March, 1905 refused to grant your petitioners herein a writ of error to the Court of Civil Appeals for

the Third Supreme Judicial District of the State of Texas and refused to review said judgment of said Court of Civil Appeals. That said judgment of the Court of Civil Appeals thereby became and is a final judgment and is the judgment of the highest court of the state of Texas at law or in equity in which a decision in said suit could or can be had.

Your petitioners further show that the federal questions were made in said cause in to-wit as hereinbefore set out, and that said questions were also made in the petition for a writ of error to the Supreme Court of the State of Texas, which said writ was refused, and that the said judgment of said Court of Civil Appeals was in favor of the validity of the said law and bond herein before referred to, a copy of which is hereunto attached, in holding that same was not in violation of Section 1 Article 14 of the Amendment to the Federal Constitution. That the decision of said question was necessary to the judgment rendered.

Wherefore your petitioners present herewith an exemplified transcript of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas in said case and pray that a writ of error to said Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas be allowed, that citation be granted and signed, that the bond herewith presented be approved, that upon compliance with the terms of the statute in such cases made and provided that said bond and writ of error may operate a supersedeas and that the errors complained of may be reviewed in the Supreme Court of the United States and that the judgment aforesaid of said Court of Civil Appeals for the Third Supreme Judicial District of Texas be reversed.

SAM LEVY,
W. M. EVANS,
P. O. COX,
By DEWEY LANGFORD AND
ORRICK & TERRELL,
Attorneys and Counsel for Petitioners.

91 The writ of error as prayed for in the foregoing petition is allowed this 10th day of April, 1905, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of Thirty-five Hundred Dollars.

Dated at Austin this 10 day of April, 1905.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

Filed in my office — day of ——, A. D. 1905.

——— ———,
Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

Title CIV. Chapter 1 A.

Revised Statutes of 1895. P. 1024.

Article 5060*a*. Hereafter there shall be collected from every person, firm or association of persons selling spirituous, vinous or malt liquors, or medicated bitters, within this state, an annual tax on each separate establishment as follows: For selling spirituous, vinous, or malt liquors in quantities of one gallon or less than one gallon, three hundred dollars; for selling such liquors in quantities of one gallon or more than one gallon three hundred dollars; provided, that in selling one gallon, the same may be made up of different liquors in unbroken packages, aggregating not less than one gallon. For selling malt liquors exclusively, fifty dollars; provided that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous or malt liquors, or medicated bitters, on the prescription of a physician, or otherwise, from the payment of the tax herein imposed; provided further, that this article shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous, or malt liquors, or medicated
92 bitters, on the prescription of a physician, or otherwise, from the payment of the tax herein imposed; provided further, that this article shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous or malt liquors are used, and which compounds are not intoxicating beverages prepared in evasion of the provisions of this chapter.

Article 5060*b*. The commissioner's court of the several counties in this state shall have the power to levy and collect from every person or association of persons selling spirituous, vinous or malt liquors, or medicated bitters, a tax equal to one-half the state tax herein levied; and where any such sale is made in any incorporated city or town, such city or town shall have the power to levy and collect a tax upon such sale equal to that levied by the commissioners' court of the county in which such city or town is situated.

Article 5060*c*. Every person, firm or association of persons desiring to engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters, shall before he or they commence the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell such spirituous, vinous or malt, liquors, or medicated bitters, an application for license to engage in the sale of such liquors or medicated bitters. Said application shall be made on oath, on forms to be provided by the comptroller, and shall designate the place at which it is proposed to carry on the sale of such liquors or medicated bitters; if in a city, the street and number of the house shall be given, and the quantities in which he or they propose to sell, whether one gallon or more than one gallon, one gallon and less than one gallon, or whether they desire to sell malt liquors exclusively, and shall also state in said application whether or not said liquors are to be sold to be drunk on the premises; and shall pay to the collector of taxes of the county in which he or they propose to sell such spirituous, vinous, or malt liquors, or medi-

cated bitters, the entire annual tax herein levied, according to the quantities in which he or they propose to sell, and the entire
93 annual tax upon such business, as may be levied by the commissioner's court of such county, and file with the county clerk bond as required in article 5060*g* of this chapter. In case the selling of such liquors or medicated bitters be carried on in a city or incorporated town, he or they so selling shall, in addition to the state and county tax herein required to be paid, pay to the collector of taxes in such city or town such tax as may be levied on said business by such city or town, and all taxes herein levied shall be paid in advance. All licenses issued under the provisions of this chapter shall be posted by the licensee in a conspicuous place in his or their place of business, and on failure to so post such license, he or they so failing shall be considered as having no license.

Article 5060*d*. Upon filing the sworn application as provided in article 5060*c*, and paying to the collector the annual state and county tax herein provided for, and filing such bond as is required by article 5060*g*, the county clerk of said county shall issue to said applicant a license to sell spirituous, vinous, or malt liquors, or medicated bitters, at the place and in the manner and quantities set forth in the application, and no sale shall be made until such license is procured. The receipt of the tax collector shall be evidence of the payment of the tax. For issuing licenses herein provided for, county clerks shall be entitled to charge a fee of twenty-five cents for each license.

Article 5060*e*. No license shall be granted for a longer or shorter period than one year. The particular place and house in which the liquors are to be sold shall be designated in the license, and no license shall authorize any person to sell spirituous, vinous, or malt liquors, or medicated bitters, at any other place or house than that designated in the license; provided, that if any person or association of persons having a license to sell such liquors, desire to change his or their place of business, such change may be made by presenting the license to the clerk of the county and having the new place of business inserted therein, but in no case to admit of the temporary closing of one place of business to sell at another place.

94 Article 5060*f*. The county clerk in each and every county in this state shall, between the first and tenth days in each month, forward to the state revenue agent a sworn statement, giving the names of all persons who have filed applications for license during the preceding month, and the tax collector of each county shall keep a register in which shall be entered the names of all persons paying taxes under this chapter, with the date of payment, and shall, between the first and tenth day of each month, make to the state revenue agent a sworn report, giving the names of all persons who have paid a liquor tax during the preceding month, and the character of tax paid by each. The reports provided for in this article shall be made upon blank forms to be furnished by the comptroller.

Article 5060*g*. Any person, firm or association of persons desiring to engage in the sale of spirituous, vinous, or malt liquors or medicated bitters capable of producing intoxication, to be drunk on the premises, shall, before engaging in such sale, be required to enter

to bond in the sum of five thousand dollars; provided, however, at any person, firm or corporation of persons dealing exclusively malt liquors shall be required to give bond only in the sum of ne thousand dollars, with at least two good, lawful, and sufficient reties, payable to the state of Texas, to be approved by the county dge, conditioned that said person, firm or association of persons, selling spirituous, vinous, or malt liquors, or medicated bitters apable of producing intoxication, in any quantity, to be drunk on ne premises, shall keep an open, quiet and orderly house or place for ne sale of spirituous, vinous, or malt liquors, or medicated bitters apable of producing intoxication; and that such person, firm or ssociation of persons, or his or their agent or employé, will not sell or permit to be sold in his or their house or place of business, nor ive nor permit to be given any spirituous, vinous, or malt liquors, r medicated bitters capable of producing intoxication, to any person nder the age of twenty-one years, or to any student of any institu- on of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, daughter, or sister of the person not to sell to such person; and that he or they will not ermit any person under the age of twenty-one years to enter and emain in such house or place of business; and that he or they will ot permit any games prohibited by the laws of this state to be layed, dealt, or exhibited in or about such house or place of business; nd that he or they will not rent or let any part of the house or place n which he or they have undertaken to sell spirituous, vinous, or alt liquors, or medicated bitters capable of producing intoxication, n any quantity, to be drunk on the premises, to any person or per- ons for the purpose of running or conducting any game or games rohibited by the laws of this state; and that he or they will not dulterate the liquors sold by them in any manner, by mixing with he same any drug; and that he or they will not knowingly sell or give away any impure or adulterated liquors of any kind; which aid bond shall be filed in the office of the county clerk of the county here the business is conducted, and shall be recorded by such clerk n a book to be kept for such purpose, for which service the said lerk shall be entitled to a fee of seventy-five cents; which said bond nay be sued on at the instance of any person or persons aggrieved by the violation of its provisions, and such person shall be entitled o recover the sum of five hundred dollars as liquidated damages for each infraction of the condition of such bond, and the said bond shall not be void on the first recovery, but may be sued on until the full penal sum named therein shall have been recovered. In addition o civil proceedings for individual injuries, brought on said bond as above indicated, if any person, firm or association of persons shall violate any of the conditions of the bond herein required, it shall be the duty of the county and district attorneys, or either of them, to institute suit thereupon in the name of the state of Texas, for the use and benefit of the county, and the amount of five hundred dollars as a penalty shall be recovered from the principals and sureties upon

the breach of any of the conditions thereof; and whenever
96 the first or subsequent bond as required is exhausted by suit at the instance of individuals, or for the use of the county a new similar bond shall be given and approved before the dealer shall have the right to further pursue the business of a liquor seller; or in case suit is pending on any such bond, and the county or district attorney shall make and file an affidavit with the clerk of the county court that he believes the bond of the defendant will be exhausted by said suit, the clerk shall at once notify the liquor dealer thereof, and it shall be the duty of the liquor dealer, within twenty days from the time the bond is exhausted or, in other event, within twenty days from the time the notice is given, to give a new bond similar to the bond first given, to be approved in the same way; and until such new bond is given and approved, when it is required by this chapter, the liquor seller shall not have the right to further pursue the business of selling liquors; and any person, firm or association of persons who shall sell liquors, in any quantity, to be drunk on the premises, without giving the first bond, or the new bond, as required by this chapter, shall be deemed guilty of a misdemeanor, and on conviction shall be fined the same amount provided for in cases where no license has been obtained. An open house, on the meaning of this chapter, is one in which no screen or other device is used or placed either inside or outside of such house or place of business for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where liquors are sold to be drunk on the premises. A quiet house or place of business, in the meaning of this chapter, is one in which no music, loud or boisterous talking, yelling or indecent or vulgar language is allowed, used or practiced, or any other noise calculated to disturb or annoy any persons residing or doing business in the vicinity of such house or place of busines, or those passing along the streets or public highways. By an orderly house is meant one in which no prostitute or lewd woman or women are allowed to enter or remain; and it is further provided, that said house must not contain any vulgar or obscene pictures. Any surety on such bond may relieve himself from further liability thereon by giving the principal in said bond notice in writing that he will no longer remain
97 as surety on said bond and by filing with the county judge an affidavit that such notice has been given, and if within five days after such notice if he fail to make a new bond, he shall cease to pursue said business until a new bond is given. And any person who shall continue to pursue said business after such affidavit is filed shall be guilty of a misdemeanor, and shall be punished as provided in cases where no license has been procured; provided, that where the sale is made in good faith, with the belief that the minor was of age, and there is good ground for such belief, that shall be a valid defense to any recovery on such bond.

Art. 5960*h*. An habitual drunkard, within the meaning of this chapter, is one who makes it a habit, or who habitually becomes intoxicated by the voluntary use of intoxicating liquors; and in all suits for the breach of such bond for unlawfully selling to an

habitual drunkard, the question whether or not such person is an habitual drunkard shall be determined by the court or jury trying such case, as any other fact.

Art. 5060*i*. The provisions of this chapter shall not apply to wines produced from grapes grown in this state, while the same is in the hands of producers or manufacturers thereof.

1897 General Laws of Texas. P/223

H. B. No. 686.

CHAPTER 158.

An Act to Amend the Law in regard to Taxation, and to Regulate the Sale of Liquor, by Amending Article 5060*a* and Article 5060*c* of Title 104, Chapter 1s of the Revised Civil Statutes of Texas, and Adding Article 5060*j* to said Chapter.

Article 5060*a*. Hereafter there shall be collected from every person firm, corporation, or association of persons, selling spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication in this State, not located in any county, subdivision of a county, justice precinct, city or town, where local option is in force under the laws of Texas, an annual tax of $300 on each separate establishment, as follows: For selling such liquors or medi-
98 cated bitters in quantities of one gallon or less than one gallon, $300; for selling such liquors or medicated bitters in quantities of one gallon or more than one gallon, $300; provided, that in selling one gallon the same may be made up of different liquors in unbroken packages aggregating not less than one gallon; for selling malt liquors exclusively, $50. And there shall be collected from every person, firm or corporation or association of persons, for every separate establishment selling such liquors or medicated bitters within this State and located within a county, subdivision of a county, justice precinct, town or city, in which local option is in force under the laws, the sum of $200; provided, the same shall not be sold in such locality except on prescription and in compliance with the laws governing sales in such localities; provided, further, that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, on the prescription of a physician or otherwise in either locality as above set forth from the payment of the tax herein imposed; provided, further that this article shall not apply to the sale by druggists of tinctures and drug compounds, in the preparation of which said liquors or medicated bitters are used and sold on the prescription of a physician or otherwise, and which tinctures and compounds are not intoxicating beverages prepared in the evasion of the provisions of this chapter nor the local option law.

Article 5060*c*. Every person, firm, corporation or association of persons, desiring to engage in the sale of spirituous, vinous or malt

liquors, or medicated bitters capable of producing intoxication, in this State, as set forth in Article 5060*a* of this chapter, shall, before commencing the sale of such liquors or medicated bitters, file with the county clerk of the county on which he or they propose to sell the same, an application under oath, on forms provided by the Comptroller, and shall designate the place in which it is proposed to engage in the sale of such liquors or medicated bitters, if any city or town in which streets are named and houses numbered, the street and number of house shall be given, and the quantities
190 in which he or they propose to sell, whether one gallon or more, or one gallon and less than a gallon, or whether they desire to sell malt liquors exclusively; provided, in localities where local option is in force not more than one quart shall be sold at one time to the same person; and shall also state in said application whether said liquors or medicated bitters are to be sold to be drunk on the premises, or to be sold on prescription in a local option county, subdivision of a county, justice precinct, town or city; and shall pay to the collector of taxes of the county in which such sales are to be made the full amount of the annual tax herein levied, and such as may be levied by the commissioner's court of such county and the city or town in which sales are to be made; and shall file with the said clerk a bond as required by Article 5060*g* and 5060*j* of this chapter. In case the sales are to be made in a city or incorporated town, the taxes by such city or town shall be paid to the collector of taxes of such city or town. All taxes herein levied or which may be levied by a county, city or town, shall be paid in advance, and upon the payment of same and full compliance herewith, the county clerk of the county shall issue to the person, firm, corporation, or association of persons, a license as provided for in Article 5060*d* of this chapter, which said license and licenses or receipts for the tax or revenues issued by the United States shall be posted by licensee in a conspicuous place in his or their place of business, and on failure to so post such license or receipt, he or they so failing shall be considered as having no license and subject to all the pains and penalties as if no such license had issued.

(Endorsed:) P. O. Cox *et al.*, Plaintiffs in Error, *vs.* The State of Texas, Defendant in Error: Petition for Writ of Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Apr. 10, 1905. R. H. Connerly, Clerk.

100 *Assignments of Error.*

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. Cox, Sam Levy and W. M. Evans, Plaintiffs in Error,
vs.
The State of Texas, Defendant in Error.

Assignments of Error.

Now comes the plaintiffs in error, P. O. Cox, Sam Levy and W. M. Evans, and respectfully submit that in the record, proceedings and final judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas for the State of Texas in the above entitled matter there is manifest error in this to-wit:

I.

The court erred in holding that the provisions of Chapter A–1 Title CIV of the Revised Statutes of the State of Texas and of the amendments thereto of the general laws of the state of Texas of 1897, Chapter 158 are not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, for that the state of Texas by and through the provisions of said Chapter A–1 Title CIV and the amendments thereto in Chapter 158 of the Acts of 1897, assume to and seek:

(1) To deprive the plaintiffs in error and certain other citizens of the United States of America and of the State of Texas of rights, privileges and immunities secured to other citizens of the United States and of the said state.

(2) To deprive plaintiffs in error and other citizens of the United States of their property without due process of law.

(3) To deprive and to deny to the plaintiffs in error and certain citizens and persons within the jurisdiction of the State of Texas the equal protection of the law.

101 II.

The court erred in holding that the provisions of said act do not deny to plaintiffs in error the equal protection of the law.

III.

The court erred in holding that the said act and amendments thereto and the authority exercised thereunder and the causes of action given thereby and the penalties imposed thereunder is within the police power of the legislature of the state of Texas, and that the State of Texas has the right to discriminate between persons engaged in the same class of business.

IV.

The court erred in holding that the provisions of said act and the amendments thereto do not unlawfully discriminate between those engaged in selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication or in the selling of wines manufactured from other fruits than grapes or in the selling of wines manufactured from grapes grown in Texas while not in the hands of the manufacturers or producers thereof, as contradistinguished from those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof, which latter class is exempt from giving bonds and from incurring penalties for violating the conditions thereof as provided for in said act.

V.

The court erred in holding that the provisions of said act did not cast special burdens upon those engaged in the sale of wines manufactured from grapes or other fruits or of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication not cast on those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof.

VI.

The court erred in holding that the provisions of said acts are uniform in their operation throughout the state upon all citizens of the state similarly situated.

102

VII.

The court erred in holding that said act does not grant special and exclusive privileges to certain citizens which it denies to plaintiffs in error and to other citizens of the state.

VIII.

The court erred in that it impliedly followed the doctrine laid down in the case of Douthit *vs.* State of Texas decided December 15, 1904 wherein the Supreme Court of this State refused to recognize the doctrine as laid down in the case of Connolly *vs.* Union Sewer Pipe Co. but followed in lieu thereof the doctrine announced in the case of the Louisiana Sugar Refining Co. *vs.* State of Louisiana, the doctrine announced in said latter case being purely upon a question of classification for taxation and was not applicable to the act herein complained of.

IX.

The court erred in holding that the provisions of said chapter and the amendments thereto of the Acts of 1897 are not in violation of Section 8, Article 1 of the Constitution of the United States which confers on Congress the exclusive power to regulate commerce among the several states.

X.

The court erred in holding said laws requiring the giving of said bond by retail dealers in spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, made such bond a valid obligation and that recovery of penalties thereon could be had against the plaintiffs in error, for that it operated to deprive the plaintiffs in error of their property without due process of law, in that the statutes of the state of Texas provide that no person can be punished in the state of Texas for any act or omission unless the same is made a penal offense and a penalty is affixed thereto by the written laws of this state, for that there is no law in the state of Texas making it a penal offense for a minor to enter and remain in a saloon and such act not being defined by the laws of the state
103 of Texas as an offense, no penalty could be imposed therefor by requiring the giving of a voluntary bond, the recovery upon said bond being recovered as a penalty.

DEWEY LANGFORD &
ORRICK & TERRELL,
Attorneys for Plaintiffs in Error.

(Endorsed:) P. O. Cox *et al.*, Plaintiff- in Error, *vs.* The State of Texas, Defendant in Error. Assignments of Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Apr. 10, 1905. R. H. Connerly, Clerk.

Supersedeas Bond.

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. Cox et al., Plaintiffs in Error,
vs.
The State of Texas, Defendant in Error.

Know all men by these presents, That we, P. O. Cox, W. M. Evans and Sam Levy, as principals, and the United States Fidelity & Guaranty Co. of Baltimore, Maryland as surety, are held and firmly bound unto the State of Texas in the full and just sum of Thirty-five Hundred Dollars ($3500) to be paid to the said State of Texas, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 10th day of April, in the year of our Lord, One Thousand Nine Hundred and Five.

Whereas at a regular term of the District Court of the State of Texas held in Hamilton County, Texas, on March 23rd 1904 in a suit pending in said court between The State of Texas, plaintiff, and P. O. Cox, W. M. Evans and Sam Levy, defendants, a judg-
104 ment was rendered against said defendants for the sum of Fifteen Hundred Dollars besides cost of suit, and

Whereas from said judgment the said defendants duly appealed said case to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, which court on the 11th day of January, 1905 rendered a judgment affirming said judgment of the District Court of Hamilton County, Texas, and

Whereas a motion for rehearing was duly made in said court and overruled and thereafter on the 15th day of March, 1905, within the time prescribed by law, a petition for writ of error to the Supreme Court of Texas was duly filed in the clerk's office of said Court of Civil Appeals for the Third Supreme Judicial District of Texas, and

Whereas said petition was rejected and refused by the Supreme Court of the State of Texas on the 22nd day of March, 1905 and the said defendants, P. O. Cox, W. M. Evans and Sam Levy, have obtained a writ of error and filed a copy thereof in the clerk's office of the said Court of Civil Appeals for the Third Supreme Judicial District of Texas to reverse the judgment in the aforesaid suit and a citation to the said State of Texas or its attorneys of record citing and admonishing it to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof.

Now the condition of the above obligation is such that if the said P. O. Cox, W. M. Evans and Sam Levy shall prosecute their said writ to effect and answer all damages and costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

[SEAL.] P. O. COX,
By SAM LEVY, *Ag't.*
SAM LEVY.
W. M. EVANS.
UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MARYLAND,
By J. J. MASSIE, *Gen'l Ag't.*

Sealed and delivered in the presence of:
E. C. ORRICK.

105 STATE OF TEXAS, *County of Tarrant:*

On this 10th day of April, 1905 personally appeared before me, J. J. Massie, who says that he is the agent of the United States Fidelity & Guaranty Co. of Baltimore, Maryland. That the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors, and the said J. J. Massie acknowledged such instrument to be the free act and deed of said corporation.

J. J. MASSIE.
JAMES GILFORD BROWNING,
Notary Public in and for Tarrant County Texas. [SEAL.]

I hereby approve the foregoing bond and sureties this 10th day of April, 1905.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

the free act and deed of said corporation.

J. J. MASSIE.
[SEAL.] JAMES GILFORD BROWNING,
Notary Public in and for Tarrant County, Texas.

STATE OF TEXAS, *County of Tarrant:*

On this day personally appeared before me, Sam Levy and W. M. Evans, known to be the persons described in and who executed the foregoing bond, and the said Sam Levy also appearing as the agent of the said P. O. Cox, acknowledged that they executed the same as their free act and deed.

Given under my hand and seal of office this 10th day of April, 1905.

[SEAL.] JULIA L. EWELL,
Notary Public in and for Tarrant County, Texas.

J. J. MASSIE.

106 (Endorsed:) P. O. Cox, *et al.*, Plaintiffs in Error, *vs.* The State of Texas, Defendants in Error. Supersedeas Bond. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Apr. 10, 1905. R. H. Connerly, Clerk.

Bill of Costs of Court of Civil Appeals.

No. 3395.

P. O. COX ET AL.
vs.
STATE OF TEXAS.

Appeal from Hamilton County.

Filing Record	.50
Docketing Cause	.50
Appearances	1.00
Filing Briefs	1.00
Filing and Entering Motion	.70
Orders	3.00
Filing 17 Extra Papers	1.70
Judgment	1.00
Taxing Costs	.50
Mandate	1.50
Recording Opinion	.10
Certified Copy of Opinion	

Certified Copy of Bill of Costs	.75
Costs of Supreme Court of Texas	7.00
Transcript Fee to U. S. Sup. Crt	55.50
Notices, (9)	4.50
Issuing 1 Precept	1.00
Sheriff's Fees	.75
Amt. Brot. Ford	$81.00

107

Amt. Brot. Ford	$81.00
Copies of Motion	3.50
Certified Copy orders to Sup. Crt	2.00
Total	$86.50

Clerk's Certificate.

Clerk's Office, Court of Civil Appeals, at Austin.

I, R. H. Connerly, Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of The State of Texas, hereby certify that the foregoing 106 pages contain true and correct copies of the proceedings had in the district court of Hamilton County, in this Court and in the Supreme Court of Texas, in cause No. 3395, P. O. Cox *et al.*, appellants, *vs.* The State of Texas, appellee, as the same appear from the files of said cause in this Court. I further certify that the following four pages are the original writ of error, and the original citation in error filed in this court in said cause.

In testimony whereof, witness my hand and the seal of said Court at Austin, this the 1st day of May, A. D. 1905.

[Seal Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY, *Clerk.*

108 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. COX ET AL., Plaintiffs in Error,

vs.

THE STATE OF TEXAS, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, Greetings:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals for

the Third Supreme Judicial District of Texas before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The State of Texas which was plaintiff in the District Court of Hamilton County, Texas, was appellee in the Court of Civil Appeals for the Third Supreme Judicial District of Texas and is defendant in error herein, and P. O. Cox who resides in Comanche County, Texas and Sam Levy and W. M. Evans who reside in Tarrant County, Texas who were defendants in the District Court of Hamilton County, Texas, appellants in the Court of Civil Appeals for the Third Supreme Judicial District of Texas and plaintiffs in error herein, wherein was drawn in question the validity of a statute of the state of Texas on the ground of the said statute being repugnant to the constitution of the United States, and the decision was in favor of its validity and manifest error hath happened to the great damage of the said P. O. Cox, Sam Levy and W. M. Evans as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein
109 given, then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you may have the same at Washington on the 10th day of May, 1905 in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States shall be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court 11 day of April in the year of our Lord, 1905.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the United States Circuit Court
for the Western District of Texas,
By SCOTT W. KEY, *Deputy.*

Allowed by
H. C. FISHER,
Chief Justice of the Court of Civil Appeals
for the Third Supreme Judicial District of Texas.

A copy of this writ is this day filed in my office for use of the defendant in error.

R. H. CONNERLY,
Clerk of the Court of Civil Appeals
for the Third Supreme Judicial District of Texas.

110 [Endorsed:] Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin Texas, Apr. 11th, 1905. R. H. Connerly Clerk.

111 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. COX ET AL., Plaintiffs in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Citation in Error.

The United States of America — the State of Texas or its attorney of record, Greeting:

You are hereby cited and admonished to be at the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, wherein P. O. Cox, W. M. Evans and Sam Levy are plaintiffs in error and The State of Texas is defendant in error, and show cause, if any there be, why judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. C. Fisher, Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas this 10th day of April in the year of our Lord One Thousand Nine Hundred and Five.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

We hereby acknowledge service of this citation and acknowledge the receipt of a true copy thereof.

MAIN & CHESLEY,
H. E. CHESLEY,
J. C. MAIN,
Att'ys of Record for the State of Texas.

112 I hereby accept service of this citation and acknowledge the receipt of a true copy thereof.

R. O. DAVIDSON,
Atto. Gen'l of Texas.

Ap'l 11th, 1905.

I hereby accept service of this citation and acknowledge the receipt of a true copy thereof.

S. W. T. LANHAM,
Gov'r of Texas.

[Endorsed:] Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Apr. 18 1905. R. H. Connerly Clerk.

Endorsed on cover: File No. 19,767. Texas court of civil appeals, 3d supreme judicial district. Term No. 266. P. O. Cox Sam Levy, and W. M. Evans, plaintiffs in error, *vs.* The State of Texas. Filed May 16th, 1905. File No. 19,767.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 267.

P. O. COX, SAM LEVY, AND W. M. EVANS, PLAINTIFFS IN ERROR,

vs.

W. B. THOMPSON.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED MAY 16, 1905.

19

(19,768.)

(19,768.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 267.

P. O. COX, SAM LEVY, AND W. M. EVANS, PLAINTIFFS IN ERROR,

vs.

W. B. THOMPSON.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

INDEX.

	Original.	Print.
Proceedings in district court of Hamilton county, Texas	1	1
Caption	1	1
Plaintiff's original petition	1	1
Defendants' second amended original answer	6	5
Plaintiff's second supplemental petition	8	7
Statement of facts	9	8
Application for license, offered by plaintiff	9	8
Liquor dealer's bond, offered by plaintiff	9	9
Testimony of W. B. Thompson	11	10
W. W. Thompson	14	13
John T. Adams	23	20
J. E. Welch	29	24
T. S. McKinley	31	25
John May	31	26
J. A. Gamble	34	28
Statement offered in evidence by defendants	35	29
Testimony of J. W. Newsome	35	29
Agreement of counsel to statement of facts	36	29
Judge's approval of statement of facts	36	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 20, 1906.

	Original.	Print.
Charge of the court	36	30
Instruction asked by defendants	40	33
Special instruction No. 1, requested by defendants	40	34
Verdict and judgment	41	34
Defendants' first amended original motion for new trial	42	36
Order overruling motion for new trial, notice of appeal, &c.	47	39
Supersedeas bond	48	40
Assignments of error	49	41
Bill of costs	56	45
Clerk's certificate	59	47
Proceedings in court of civil appeals	60	48
Opinion	60	48
Judgment	62	50
Motion for a rehearing	63	50
Order overruling motion for rehearing	70	55
Proceedings in supreme court of Texas	70	55
Application for writ of error	70	55
Judgment	86	66
Bill of costs	87	67
Further proceedings in court of civil appeals	88	67
Petition for writ of error	88	67
Assignments of error	103	77
Supersedeas bond	106	80
Bill of costs	109	81
Clerk's certificate	110	82
Original writ of error	111	82
Original citation in error	114	84
Acceptance of service of citation	115	84

Caption.

THE STATE OF TEXAS, *County of Hamilton:*

At a term of the District Court, begun and holden within and for the County of Hamilton, at Hamilton, on the 29th day of February, A. D. 1904, and which adjourned on the 25th day of March A. D., 1904, the Hon. N. R. Lindsey, Judge thereof presiding, the following cause came on for trial, to-wit:

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Plaintiff's Original Petition.

Filed 9th day of June, 1902.

In the Hon. District Court of the 29th Judicial District of the State of Texas, August Term, 1902.

THE STATE OF TEXAS, *County of Hamilton:*

To the Hon. Judge of said Court:

Now comes W. B. Thompson, hereinafter styled plaintiff, and complaining of P. O. Cox, Sam Levy and W. M. Evans, hereinafter styled defendants, respectfully represents to the Court that the plaintiff resides in the County of Erath, and State of Texas, and that the defendant, P. O. Cox, resides in the County of Hamilton, in said State, and that each of the co-defendants, to-wit, Sam Levy and W. M. Evans, reside in the County of Tarrant, and State aforesaid.

1. For cause of action the plaintiff shows to the Court that the defendant P. O. Cox, under the firm name of P. O. Cox & Co., on or about the twenty second day of May, 1902, procured from the Tax Collector of Hamilton County, Texas, State and County license, to do business as a retail liquor dealer in said county and State in the city of Hico, on parts of lots, Nos. eleven and twelve, in Block No. three, Division, one in said city of Hico, and in the house known as the J. A. Gamble building.

That said license was procured for the purpose of engaging in the business of retailing spirituous, vinous and malt liquors capable of producing intoxication. That on or about the said last named date, and in connection with the procurement of said license, and for the purpose of being able to pursue said occupation, and as is required by law, the defendant, P. O. Cox, in his own name and alone as principal, made, executed and delivered for record a bond in the
2 sum of Five thousand dollars payable to the State of Texas as required by law, with the defendants, Sam Levy and W.

M. Evans as sureties on said bond, which said bond was duly and legally received and approved by J. C. Main County Judge of Hamilton County on the 22nd day of May, 1902. That under and by virtue of said bond and license the defendant, P. O. Cox, was authorized and in fact has been and is now doing business under the same as a retail liquor dealer, engaged in the business of selling and retailing spirituous, vinous and malt liquors capable of producing intoxication as hereinbefore alleged in said County and city of Hico.

2. That said bond is conditioned among other things that P. O. Cox & Co., (a firm composed of P. O. Cox) their agents and employees would not sell nor permit to be sold in their house or place of business nor give nor permit to be given any spirituous, vinous and malt liquors or medicated bitters capable of producing intoxication, to any person under the age of twenty one years, and that they will not permit any person under the age of twenty one years to enter and remain in such house or place of business, which said bond was duly signed by all the defendants, and filed for record in the County Clerk's office of said Hamilton County, on the 22nd day of May, 1902, and which said bond is in words and figures substantially as follows, to-wit:—

"THE STATE OF TEXAS, *County of Hamilton:*

Whereas P. O. Cox & Co. desires to engage in the sale of spirituous, vinous or malt liquors and medicated bitters, capable of producing intoxication, to be drunk of the premises in quantities of one gallon or less at, ... in the town of Hico, in the County of Hamilton, State of Texas, and has made the application and paid the taxes required by law.

Therefore, know all men by these presents, that we P. O. Cox & Co., as principal, and Sam Levy and W. M. Evans as sureties, are held and firmly bound unto the State of Texas in the sum of five thousand dollars, for the payment of which we bind ourselves, our heirs and legal representatives, jointly and severally.

Conditioned, that the said P. O. Cox & Co. principal shall keep an open, quiet and orderly house or place for the sale of spirituous,
vinous or malt liquors and medicated bitters, capable of pro-
3 ducing intoxication, and that they or their agent or employé, will not sell nor permit to be sold in their house or place of business nor give nor permit to be given any spirituous, vinous or malt liquors and medicated bitters, capable of producing intoxication to any person under the age of twenty one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing through the Sheriff or other peace officer, by the wife, mother, or sister of the person, not to sell to such person; and that they will not permit any person under the age of twenty one years to enter and remain in such house or place of business; and that they will not permit any games prohibited by the laws of this State to be played, dealt or exhibited in or about such house or place of business; and that they will not rent or let any part of the house or place in which they have undertaken to sell

spirituous, vinous or malt liquors and medicated bitters, capable of producing intoxication, to be drunk on the premises in any quantity, to any person or persons, for the purpose of running or conducting any game or games prohibited by the laws of this State; and that they will not adulterate the liquors sold by them in any manner by mixing with the same any drug; and that they will not knowingly sell or give away any impure or adulterated liquors of any kind; then this obligation to be null and void, otherwise to remain in full force and effect.

Witness our hands, this 21st day of May, 1902.

P. O. COX,
SAM LEVY,
W. M. EVANS.

STATE OF TEXAS, *County of Tarrant:*

I, W. E. Butler, Clerk of the County Court in and for said County of Tarrant, do certify that Sam Levy and W. M. Evans whose names appear signed to the annexed bonds are in my opinion good and ample security for the amounts therein specified. That Sam Levy and W. M. Evans have property in said County subject to execution of a larger amount, and that if said bond was offered me for approval the same would be accepted and approved.

To certify which, I hereunto set my hand and impress of my official seal, at office in the city of Fort Worth, Texas, on this
4 the 21st day of May, A. D. 1902.

[SEAL.] W. E. BUTLER,
Clerk of the County Court, Tarrant County, Texas,
By WALTER G. KING, *Deputy.*

THE STATE OF TEXAS, *County of Hamilton.*

Before me F. C. Williams, Clerk of the County Court in and for said County and tSate on this day personally appeared P. O. Cox, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 22 day of May, A. D. 1902.

[SEAL.] F. C. WILLIAMS,
Co. Clerk, Hamilton County, Texas.

Examined and approved May 22, 1902.

J. C. MAIN,
Co. Judge, Hamilton Co., Texas.

Filed for Record, May 22- 1902.

F. C. WILLIAMS,
C. C. CH. Ct.

3. Plaintiff further shows to the Court that he is the father of William W. Thompson, a son in his nineteenth year, who is in fact and appearance a mere boy.

That on or about, to-wit, May, 30th, 1902, after the procuring of the license by defendant P. O. Cox, and the filing of the bond hereinbefore set out, and within less time than one month from said date herein-before mentioned, the said minor William W. Thompson, without the knowledge or consent of this plaintiff or any one authorized to give such consent entered into defendant's house and place of business herein-before designated, in the said city of Hico, in said county and State, upon three different, distinct and separate occasions, and which said minor was allowed by the defendant, P. O. Cox to so enter and remain in said house and place of business upon the said several occasions, and did so enter and remain as aforesaid, to plaintiff's damage in the sum of fifteen hundred dollars, which said house and place of business was devoted to the sale of spirituous, vinous and malt liquors capable of producing intoxication, contrary to law and defendant's undertaking in his said bond.

4. Plaintiff would further show to the Court that said William W. Thompson, the minor son of this plaintiff, who was then and there allowed to enter and remain in the defendant's place
5 of business, was upon each of said three occasions herein-before set out and alleged to have occurred on or about the said 30th day of May, 1902, given and permitted to be given by the defendant, P. O. Cox, his agents and employés, intoxicating liquors, which was then and there upon each of said occasions sold and given, and permitted to be sold and given to said minor William W. Thompson, by the defendant, P. O. Cox, his agents and employés; that said intoxicating liquor was sold and given, and permitted to be sold and given to the said minor, William W. Thompson, by the defendant, P. O. Cox, his agents and employés, to this plaintiff's damage in the sum of fifteen hundred dollars.

5. Premises considered, plaintiff prays that each of the defendants be cited in terms of law to appear and answer herein, and that upon final hearing hereof, for the minor William W. Thompson entering and remaining in the house and place of business of the defendant P. O. Cox, a place devoted to the sale of spirituous, vinous, malt and intoxicating liquors capable of producing intoxication and the sale of spirituous, vinous and malt liquors under license and bond; that he have judgment against the said P. O. Cox and the sureties upon his bond, Sam Levy and W. M. Evans, for liquidated damages in the sum of fifteen hundred dollars; and that for the sale and gift and the permitting to be sold and given, spirituous, vinous and malt liquors to said minor, that he have judgment for liquidated damages against P. O. Cox, as principal, and Sam Levy and W. M. Evans as sureties on the bond of the said defendant, Cox, in the sum of fifteen hundred dollars; and that he have judgment upon the *the* several counts and violations of said bond, herein pleaded, liquidated damages in the sum total of three thousand dollars, together with all costs of suit in this behalf expended and for such other further gen-

eral and special relief as to the Court may seem equitable in the premises.

MAIN & CHESLEY,
Attorneys for the Plaintiff. W. B. Thompson.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Suit upon Liquor Dealer's Bond, for Statutory Penalty. Plaintiff's Original Petition. Filed 9th day of June 1902. R. C. Cornelius, Clerk Dist. Court, Hamilton Co. Texas.

Defendants' 2nd Original Answer.

6 Filed Mch. 3rd, 1904.

In District Court of Hamilton County, Texas, February Term, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Now come the defendants herein by attorney, and under leave of Court, files this defendants' 2nd Amended Original Answer, in lieu of and to take the place of defendants' original answer filed herein on, to-wit, the 25th day of August 1902, and for amendment say and allege.

First. Defendants demur to plaintiff's petition, and say the same shows no cause of action against them, and of this they pray judgment and etc.

D. LANGFORD,
Att'y for Defendants.

Second. And for special exception defendants say that plaintiff's petition is insufficient in law because the alleged liquor dealer's bond upon which this suit is predicated fails to show on what lot, block or street in the town of Hico, the said business of liquor dealer was carried *to* on, nor is the house where the same was located or to be located described or in any manner identified. Wherefore defendants say that said petition is insufficient in law, and of this they pray judgment, and etc.

D. LANGFORD,
Att'y for Defendants

Third. Now come the defendants herein and demur to plaintiff's petition filed herein, and say the same is insufficient in law, because that part of the act of the legislature under which this suit is brought regulating the sales of liquor and prescribing the tax and penalty, is unconstitutional, construed in connection with Art. 5060*i* of said act, in that said Art. exempts from the provision of the statute people

engaged in the same business, to-wit, the sale of vinous and intoxicating liquors, provided they sell wine produced from grapes grown in the State by the seller. And of this defendants pray judgment and etc.

D. LANGFORD,
Att'y for Defendants.

Fourth. Without waiving the foregoing exceptions or either of them, defendants deny all and singular the allegations in plaintiff's said petition contained and of this they put themselves upon the country etc.

D. LANGFORD,
Att'y for Defendants.

Fifth. And for further answer defendants say that if P. O. Cox, his agents or employees ever sold or gave or permitted to
7 be sold or given any intoxicating liquor to W. W. Thompson, he being a minor on or about the date alleged, which is not admitted but denied; that the same was sold and given to said Thompson in good faith, with the belief, and having good grounds for said belief that said W. W. Thompson was twenty one years of age, and this they are ready to verify.

D. LANGFORD,
Att'y for Defendants.

Sixth. And for further answer herein defendants aver that if W. W. Thompson being a minor ever entered and remained and was permitted to enter and remain in the saloon of P. O. Cox by the said P. O. Cox his agents and employés, as alleged in plaintiff's petition, which is not admitted but denied, that said W. W. Thompson so entered and remained in the place of business and saloon of said P. O. Cox for the purpose of securing intoxicants, the said P. O. Cox, his agents and employés believing and having good grounds to believe that said W. W. Thompson was twenty one years of age. And the said W. W. Thompson so entered and remained, if at all, no longer than was reasonably necessary to procure said intoxicants, which were sold and given to him by said P. O. Cox, his agents and employés in good faith, believing and having good grounds to believe that said W. W. Thompson was above the age of twenty one years. And defendants aver that the alleged entering and remaining of the said W. W. Thompson and the permission by the said P. O. Cox, his agents and employés, for said W. W. Thompson to enter and remain in the saloon of P. O. Cox was but a necessary incident and part of sales of intoxicants to said W. W. Thompson by the said P. O. Cox, his agents and employés, made in good faith, believing and having good grounds to believe that said W. W. — was twenty one years of age, and this they are ready to verify.

D. LANGFORD,
Att'y for Defendants.

Seventh. And for further answer herein defendants say that if W. W. Thompson ever entered and remained in the saloon of P. O. Cox & Co., that the same was for the purpose of procuring intoxicants, which were sold and given to him in good faith, with the belief that he was above the age of twenty one years, and after and before intoxicants were sold and given to said W. W. Thompson he did not and was not permitted to tarry or loiter in said saloon, and this they are ready to verify.

D. LANGFORD,
Att'y for Defendants.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Defendants' 2nd Amended Original Answer. Filed Mch. 3rd, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

8 *Plaintiff's 2nd Supplemental Petition.*

Filed Mch. 21, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

In District Court of Hamilton County, Texas, February Term, 1904.

To Hon. N. R. Lindsey, Judge of said Court:

Now comes plaintiff and files this his second supplemental petition, leave of Court having been first had and obtained, and replying to the defendants' second Amended Original Answer says and alleges as follows:

First:—Plaintiff demurs generally to the defendants' said answer and says that same is insufficient in law and affords no defense to the cause of action pleaded by the plaintiff and of this he prays judgment of the Court.

MAIN & CHESLEY,
Attorneys for Plaintiff.

Second:—The Plaintiff specially excepts to paragraph No. 6, of the defendants' answer and says that same is insufficient in law in this: That a belief based upon good ground, that W. W. Thompson was of age at the date of the alleged entry and remaining would not constitute a defense to the charge in plaintiff's petition for permitting the minor to enter and remain in such place of business, and this though the entering and remaining may have been but an incident to and a part of sales of intoxicants made to the minor, and because the only defense avail- to said charge is set up in paragraph 7, of said answer.

Wherefore, plaintiff prays that all of said paragraph No. 6 be stricken out.

MAIN & CHESLEY.
Attorneys for the Plaintiff.

Third:—Further replying to said answer the plaintiff denies all and singular the allegations in the defendants' answer contained and of this he puts himself upon the country and prays judgment of the Court.

MAIN & CHESLEY,
Attorneys for the Plaintiff.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Pl'ff's 2nd Supplemental Petition. Filed 21 day of Mch. 1904. R. C. Cornelius, Clerk Dist. Court, Hamitlton Co. Texas.

9 *Statement of Facts.*

Filed Apr. 12th, 1904.

In the District Court, Hamilton County, Texas, February Term, A. D. 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Be it remembered that on the trial of the above numbered and entitled cause in the District Court of Hamilton County Texas the following evidence was introduced and none other towit:

The plaintiff offered and read in evidence the following application for license and the following bond, towit:

Application for License for the Sale of Spirituous, Vinous or Malt Liquors or Medicated Bitters.

STATE OF TEXAS, *County of Hamilton, ss:*

We, the undersigned hereby make application for license for the sale of spirituous, vinous or malt liquors or medicated bitters in quantities of one gallon or less to be drunk on the premises; and having been sworn declare that on the 24th day of May 1902, we intend to engage in the sale of such liquors, in the quantities and in the manner above applied for, at No. — J. A. Gamble building, in the town of Hico County of Hamilton, and part of lots No. 11 and 12 in block No. 3 division one.

(Sign-) P. O. COX.

Sworn to before me this 22 day of May 1902.

[SEAL.] F. C. WILLIAMS,
Co. Clerk, Hamilton Co., Tex.,
By J. T. DEMPSTER, *Deputy.*

Liquor Dealer's Bond.

Liquor Dealer's Bond, Offered in Evidence by Plaintiff.

THE STATE OF TEXAS, *County of Hamilton:*

Whereas, P. O. Cox & Co. desires to engage in the sale of spirituous, vinous or malt liquors, and medicated bitters capable of producing intoxication, to be drunk on the premises, in quantities of one gallon or less at ——, in the town of Hico, in the County of Hamilton State of Texas, and has made the application and paid the taxes required by law.

Therefore know all men by these presents, that we P. O. Cox & Co, as principal-, and Sam Levy and W. M. Evans as sureties, are held and firmly bound unto the State of Texas in the sum of five thousand dollars, for the payment of which we bind ourselves, our heirs and legal representatives, jointly and severally:

Conditioned, that the said P. O. Cox & Co. principal-, shall keep an open, quiet, and orderly house or place for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication; and that they or their agent or employé, will not sell nor permit to be sold in their house, or place of business, nor give nor permit to be given any spirituous, vinous or malt liquors, and medicated bitters capable of producing intoxication, to any person under the age of twenty one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, daughter, or sister of the person, not to sell to such person; and that they will not permit any person under the age of twenty one years to enter and remain in such house or place of business; and that they will not permit any games prohibited by the laws of this State to be played, dealt, or exhibited in or about such house or place of business; and that they will not rent or let any part of the house or place in which they have undertaken to sell spirituous, vinous or malt liquors, and medicated bitters capable of producing intoxication in any quantity to be drunk on the premises, to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this State; and that they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug; and that they will not knowingly sell or give away any impure or adulterated liquors of any kind; then this obligation to be null and void, otherwise to remain in full force and effect.

Witness our hands, this 21st day of May 1892.

P. O. COX.
SAM LEVY.
W. M. EVANS.

Examined and approved May 22nd 1902.

J. C. MAIN,
Co. Judge, Hamilton Co., Texas.

2—267

THE STATE OF TEXAS, *County of Tarrant:*

I, W. E. Butler, Clerk of County Court in and for said County of Tarrant, do hereby certify that Sam Levy and W. M. Evans, whose names appear signed to the annexed bond are in my opinion good and ample security for the amounts therein specified. That Sam Levy and W. M. Evans have property in said County subject to execution of a larger amount, and that if said bond was offered me for approval, the same would be accepted and approved.

11 To certify which, I hereunto set my hand and impress of my official seal, at office in the city of Fort Worth, Texas, on this the 21st day of May, A. D. 1902.

(Signed) W. E. BUTLER,

[SEAL.] *Clerk of the County Court, Tarrant County, Texas.*

By WALTER G. KING, *Deputy.*

THE STATE OF TEXAS, *County of Hamilton:*

Before me F. C. Williams, Clerk of the County Court in and for said County and State on this day personally appeared P. O. Cox, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 22 day of May A. D. 1902.

[SEAL.] F. C. WILLIAMS,

Co. Clerk Hamilton County, Texas.

Filed for record, May 22, 1902.

F. C. WILLIAMS, *C. C. C. H. Co.*

THE STATE OF TEXAS, *County of Hamilton:*

I, F. C. Williams, Clerk of the County Court in and for said County, do hereby certify that the foregoing instrument of writing dated the 21st day of May A. D. 1902, with its certificate of Authentication, was filed for record in my office, on the 22 day of May, A. D. 1902, at 2 o'clock, P. M. in the Bond Records of said County in Book "I" on page 24.

Given under my hand and seal of office, at Hamilton the day and year last above written.

[SEAL.] F. C. WILLIAMS,

Clerk County Court, Hamilton County, Texas.

By J. T. DEMPSTER, *Deputy.*

Testimony of W. B. Thompson.

W. B. THOMPSON, a witness for plaintiff, duly sworn, testified:

My name is W. B. Thompson, I live in Erath County Texas about nine miles north of Hico Texas. I have been in the County for

about twenty seven years. I am plaintiff in the suit cause #1335,—W. B. Thompson *v.* P. O. Cox *et al.* I am the Father of W. W. Thompson. On the morning of May 30th 1902, my son W. W. Thompson left home stating that he was going to Hico. At that time he was about eighteen years and six months old. He was born November 30" 1883. I never did give my consent to P. O. Cox or any of his agents or employes to sell or give my son W. W. Thompson liquor. I did not know that there was such a man as P. O. Cox. I never did give my consent to P. O. Cox or any of his agent- or
12 employes to sell or give my son W. W. Thompson any drinks of any kind,—or any one else. I never gave my consent to P. O. Cox or any of his agents or employes to permit my son W. W. Thompson to enter and remain in his place of business.

Cross-examined by DEFENDANT:

I have lived in Erath County for about twenty seven years. My son, W. W. Thompson, was born on November 30" 1883,—that is what the record shows. Yes it was May 30" 1902 that he left with the statement that he was going to Hico. I remember it was the 30" of May because I went to Hico the next day myself and Mr. Connolly saw me there and asked me how old the boy was and I told him I did not think he was eighteen years old then and then he told me what had happened, and after I went home we talked about it and I remember it was the 30", because I have a clock that tells the day of the month, and I looked at it. the boy left the house that morning pretty early,—I suppose the sun was about an hour or an hour and a half high,—it was tolerable soon after breakfast. I did not send him to Hico,—I did not know anything about it until he started, and he then said he was going to Hico to get him a saddle. He was staying at house then. I do not remember how long at that time he had been staying at my house then. He had worked there a few days and if I did not have anything for him to do he would go somewhere else and work. Prior to that time he had worked some for my son in law. When I did not have any thing for him to do he went where he pleased and hired to whom he pleased. He never asked me about who he should hire to. He would often tell me that he was going to work for such and such a person. Sometimes he might ask me and sometimes he might not,—if I did not have anything particular for him to do he wouldn't. When he worked for other people I never had anything to do with his wages,—he always kept the money himself. On the morning of May 30" 1902, I heard him at the breakfast table or soon after say that he was going to Hico,—he said he was going to Hico to get him a saddle. I was out about the lot when he left that morning. Yes I testified in a former trial of this case. I only know where he went by what he said,—he said he was going to Hico, and I never saw him any more that day. No I did not ever give my consent for him to go
13 into Cox's saloon,—I did not know Cox had a saloon. No I did not at that time — that there were saloons in Hico,—I was there some time before that and some one told me that they were going to put in saloons again there. The next time after the boy

went to town that I saw him was the next morning about nine o'clock. I had started to Hico and I met him about three miles this side of my house,—he went on home and I came on to town. I think I instituted this suit about the middle of June following. I have not paid any of the costs of this suit yet. I cannot tell you who is paying the costs of this suit. There is a right smart of what is recovered in this suit that I will get. I will get about half of the recovery. My son is living with me now,—he has been there off and on ever since the last trial of this suit. He has worked a little away from home since then. He has been at home about three fourths of the time since then. He worked for Mr. Salmon, his brother in law some, and he picked cotton for several people there in the community,—sometimes a day or two and sometimes as much as a week, and sometimes I did not know where he was. Prior to May 30" 1902, I had seen empty bottles lying around the buggy shed and while I did not absolutely know it, yet I was satisfied that the boy had been getting whiskey some where. Yes, I have talked to him about it. I just asked him who put them bottles there, and sometimes he would say he did not know, and sometimes when I would ask him where he got the whiskey he would say "well I got it all the same." I asked several boys around there and they said that they did not know anything about him drinking whiskey,—that they never got him any or saw him get any. I had been finding bottles for a year or so back prior to May 30" 1902,—I would find half pint bottles and sometimes pint bottles. I had another boy older than this one, but he never got any whiskey. I never found very many bottles,—when he would go off to town and come back I would find bottles. Yes in February 1901 he brought some whiskey to the house that I had sent him for,—that was the time we had the measles there and I sent him to town to get some whiskey. I told him to go to Bill Dawson. I told him I wanted him to go to town that day and get half a gallon of good whiskey. I told him to go to Bill Dawson and get half a gallon of good whiskey, and told him while he was getting his horse ready I would write an order for it, and he said "I can get the whiskey without any order,—
14 I do not want any order," and he went and got his horse and went off without the order. I told him Dawson would not let him have it, and tried to get him to take the order because I did not think he could get the whiskey without it, and I did not want him to ride up there and back for nothing. He went off without the order anyhow. I would have gone myself but I was not well enough. Yes I told him to go to Bill Dawson, and I knew Bill Dawson was a saloon keeper. The reason I wanted to send the order was that I knew it was against the law to sell minors whiskey.

Re-examined by the PLAINTIFF:

Bill Dawson lived at Stephenville,—he did not live at Hico. That is the only time I ever sent the boy after whiskey. Yes my family was sick with the measles then.

Cross-examined by DEFENDANT:

I did not send to a saloon,—I told him to go to Bill Dawson, and tell him to send me the whiskey. Yes I knew he would have to go into a saloon to get it,—but I have went to saloons many times and got whiskey and never went in the house. I did not study much about whether he would have to go in and get it or would get it from the outside. I just told him to go to Bill Dawson and get the whiskey,—I wanted him to take the order to get it,—I had no idea that he would bring back the whiskey because he did not take the order. Yes I permitted him to ride up there which was twelve miles without the order.

Testimony of W. W. Thompson.

W. W. THOMPSON, a witness for plaintiff, being duly sworn, testified:—I am a son of W. B. Thompson. I am now past twenty years old. I will be twenty one years old the 20" day of this coming November. I know the year I was born. I was born in 1884. Yes I believe it was 1884. Yes I am certain of that. I am twenty past,—I will be twenty one on the 20" of this coming November. In 1902 I was eighteen past. I know P. O. Cox. I do not know where he is now. I knew him when he lived at Hico. He run a saloon there. Yes I have been in his place of business. I was there on May 30" 1902. I was in there several times that day. I was in there some six or eight times that I remember of being in there. I purchased whiskey and beer while I was in there. I paid for it. I remember the first time I was in there that day. The first time I was in there that day another fellow named McFadden went in with me and we bought two toddies. We paid 10 cts. each for them. I paid for them. I drank mine. That fellow May was the bar tender. The toddies were made out of whiskey. No one objected to my coming in there. No one asked me to leave. The first time I stayed in there some ten or fifteen minutes,—maybe twenty minutes. Fifteen minutes anyhow. I talked around there a while,—there were a lot of fellows sitting in there on beer kegs and I talked to them. After we drank the whiskey we stayed around in there awhile and then drank a small bottle of beer apiece, before going out. Then we *we* went out and knocked around town awhile and then went back in the saloon. The same fellow was with me the second time that was with me the first time. I think that fellow is in California now. The second time we were in there we bought beer. I think it was keg beer,—I know it was. I paid a nick*le* a glass for it. Mr. Cox waited on us that time. Mays waited on us the first time. I do not know exactly the time we stayed in there that time,—about five minutes. We stayed in there some five minutes,—maybe ten. This time we had to wait a right smart little bit before they got our drinks ready,—there were a whole lot of men in there and they had to be waited on. I think we went out immediately that time after we drank. We went to the laundry. I was back in there after that again. I reckon we were gone down to the laundry about half an hour before we went back into the saloon. Yes this

same man went back in there with me the third time. I bought beer when I went in there. I paid a nickle a glass for it. This time I stayed in there about half an hour I reckon. I stood up some and sit down some. There was no one that time presented a written order to me to sign. I think after that they did,—I do not remember very much about the statement. The reason I do not remember about the statement much is that I was drunk. I do not know the number of times I drank before the statement was secured. I do not remember having a conversation with Mr. Cox that day until he come around with that paper,—I would not sign it until I got too drunk and then he got me to sign it then. I never signed it when he first brought it to me. While I was in there that half hour I drank as many as half a dozen times. After I went out this time I
15 think I went back again. I bought a saddle that day. I do not remember starting home. I bought a couple or three bottles of beer before I left some time and put it in my saddle pockets. I did that a right smart while before I started home. I do not know what I did with that bottled beer. I do not remember what time of the day it was when I left for home. I got home next day about twelve o'clock. I stayed on the road part of the night, and I stayed the rest of the night at my sister's house. She lived about four miles from my father's place,—on this side. I do not remember how long I had been in the saloon at the time they got me to sign that statement. I had been drinking all along before I signed the statement. The first thing that was said about age, Mays, the bar-tender, says "are you boys twenty one years old," and we told him we reckoned we were, and there was nothing else said about it at all until Cox come around with that paper. Cox never did ask us if we were twenty one years old. He brought the paper around to me and said some men were cutting up out there on the outside about it, and said if I would sign the paper it would save him. Up to the time I took the bottle beer out and put it in my saddle pockets I had been in the saloon three or four times,—maybe more,—I would not be positive about it.

Cross-examined by the DEFENDANTS:

Yes I say I was born in 1884. Yes I think that is my birth year. Before this day I had seen P. O. Cox there around Hico a time or two. I had not been in his saloon before that day. No I do not think that I had taken whiskey home very often and left bottles lying around my father's premises. Yes I might have left bottles around there,—I do not know as I left anything around the place. Yes I have carried whiskey home. I did not leave bottles lying around the premises,—my father sent me to Stephenville once after some whiskey. I do not know as I ever left bottles that I had used the whiskey out of laying around my father's premises. No I had never left any empty bottles about the stable or lying around where my father could find them. My father has got after me a time or two about drinking whiskey. I do not know that he had found any bottles I had laid around. I do not know as I left any bottles lying around the premises. This morning I left for Hico,—I left

home about between nine and ten o'clock and went straight
17 on to Hico. It was about eight and a half or nine miles to Hico. It took me about an hour and a half to make the trip. When I got to Hico I knocked around over town until I met up with McFadden. He was a man that used to live up close to Clairette,—I think he is in California now,—I am not for certain about that. He left this country last September. I met him along about Stovall's building somewhere. I do not know how we come to go to the saloon,—we just walked up there. I do not remember which one of us proposed going up there. We did go up to the saloon, and both went in at the same time. I did not state anything to him about me not being twenty one years old. The bar tender asked us if we were twenty one years old, and we told him we reckoned we were. Yes I remember*ing* swearing here on a former trial of this case. Q. Do you remember stating that it was about eleven o'clock when you went in there and "the bar tender when we walked up asked us if we were twenty one years old, and we told him we were. I told him I was twenty one years old." Did you state that? A. I made some statement about it. Q. You did tell him you were twenty one years old didn't you? A. We told him we reckoned we were twenty one. I told him I reckoned I was twenty one. Q. Did you not testify directly before that you told him you were twenty one years old? A. I do not know. Q. Do you remember? A. I do not remember much about it. Q. Did you tell him or not that you were twenty one years old? A. I never told him for certain I was twenty one. I told him I reckoned I was twenty one. That was all there was said and I never paid much attention to it. McFadden did not say anything about it. The bar tender just says are you boys twenty one years old, and we both spoke at the same time and said we reckoned we were That was about all that was said about it. There was nothing else that I remember of said about it. No I was not then twenty one years old. I do not know as I had been in other saloons and told them that I was twenty one years old. I do not know as I have told other bar tenders that I was twenty one years old. I did not tell any other bar tenders I was twenty one years old. It did not take any time at all when the bar tender was asking us about our age.

Yes there were others in the saloon at the time. I do not
18 think there was any one else buying drinks right where we were,—there were some down towards where Mr. Cox was at the far end, and he was opening up a keg of beer. Yes he could see us. I took a toddy. It does not take very long to fix the toddy. Yes he had to get out glasses and fix it,—I guess it took him about a minute to do that,—I was not timing him. Yes he had to get the glasses and water and set out the bottles with the whiskey in it. Then we drank the toddies and I paid him. I do not remember whether I paid him with the exact change, or whether he had to make change for us? I paid him ten cents for each of the drinks. I do not know that they were selling such drinks at a bit, or two *of* a quarter,—they sold them to me at ten cents each. After we drank the whiskey we stayed around in there a little bit. We

stayed in there some ten or fifteen minutes. No I can't tell how much time was taken up in getting the drinks ready, and drinking them, and making the change and paying for the drinks,—just a short time though. I do not know that I testified on a former trial of this case that I paid for the drinks, the price was ten cents, I paid twenty cents for both, and then we went out and knocked around,—that we immediately went out,—I do not remember that. No I will not say that I did not testify that way. I did not go immediately out after that. When we first went in we taken a drink apiece,—I did not drink any more right then,—we stayed there in the saloon a little bit and then took some more. We were there in the saloon talking, to first one and then another. I think Tom Lane was one of the parties in there. I think we stood up around in there. I do not remember whether or not there — chairs in the saloon. We stood on the floor to do our talking. We were back some two or three steps from the counter. I do not know what the bar tender was doing while we were doing this. I do not know whether he saw us or not after we left the bar. He seen us when we come back up to the bar. He could have seen us there while we were away from the bar. No I could not swear that he saw us while we were away from the bar. There were several in there talking at the time. I reckon there was a dozen persons in the room at the time besides me and McFadden. I do not believe I can remember the names of any of them except Tom Laney,—I had seen all of them before, but I did not know their names. The first time I was in the saloon I took one drink of whiskey when I first
19 went in and then I took a drink of beer before I went out.

I did not testify on the former trial that I only drank the whiskey and went out. I did not testify to any such thing. I testified then that I took two drinks the first time. Yes the whole time I was in there was not over about fifteen minutes. After we took the second drink we knocked around town for a little while,—I do not remember every place we went to. We went around by Stovall's building and then around by Phillip's. There we looked at some saddles. I did not buy one then. After we left there we went back to the saloon. We did not go to the laundry that time. It was after I went in the saloon the second time that I went to the laundry. I do not remember whether it was I or McFadden that proposed going back to the saloon. One wanted to go about as bad as the other. I do not remember what all was said when we started back the second time. I did all the paying for the drinks,—he did not have any money. We went in the saloon through the main door on the street. The second time we went in at the main front door,—the same one we went in the first time. I do not remember who we met in there at that time. When we went in there the second time Mr. Cox was waiting on the bar. When we went in there that time it was somewhere about noon,—I do not know the exact time. I had not eat dinner then,—we did not eat any dinner that day. When I first saw Cox he was opening up a keg of beer. The second time we went in there he was behind the bar and got the beer for us. When we went in we told him we wanted a couple

of beers, and he set them out to us and there was no more said. I paid for the beer. I do not know as I walked right straight out,—we stayed in there some little bit. I do not know what we were doing in there. Yes I know I stayed in there,—I know we stayed in there a little bit,—we never stayed in there long the second time. We were just standing around in there,—just like any one else would be. I do not remember who all was in there at that time. Yes there were others besides me and McFadden there, I don't remember who they were. The bar tender, Mays, was also in there,—he was waiting on some of the rest of them. He was behind the bar. They were both waiting on the bar then,—Mays and Cox. When we went in the first time Cox was not waiting on the bar,—he was opening up a keg of beer and Mays was waiting on the bar. I am not for certain whether Cox spoke to me or not. I would say approximately that I stayed in there the second time about five minutes. I was not timing myself. Yes Cox had to draw the beer,—that takes some time of course, but mighty little. Yes he drew the beer from a faucet. I do not know how long it took him to do that,—no it did not take him as much as two minutes. I guess it would take about a minute to do that. No, not a minute to each glass,—a minute to draw both of them. Yes Cox was a one armed man, but he could carry two glasses in one hand. I could not swear that he could draw the two glasses of beer in one minute and could not swear that he couldn't—it took him very little time to do it though. Yes after we drank the beer I had to pay for it. I do not remember whether I had the exact change or whether Cox had to make change for me. Yes if he had to turn around and make change that would take a little time. I do not remember as to the matter of change. We went out that time at the front door and went to the laundry. The Laundry is down close to Weiser's mill, south of where we were. I guess it was about 350 or 400 yards from the saloon. I do not remember who was running the laundry at that time. By this time I was getting a little drunk. Yes I say that I was in the saloon the second time about five minutes. I do not know the exact time we got back to the saloon the next time. I do not remember very much along after the second time I was in the saloon,—no, the third time. Yes it was after I went to the laundry. We stayed at the laundry just a short time,—two or three or four minutes. I just went to get some laundry and pay for it and then I came back. By this time I was becoming intoxicated. I can remember everything very well when I was at the laundry, but still I was tolerably boozy. From the laundry we went back up to the saloon,—yes to Cox's saloon. Yes McFadden went with me. We went into the saloon through the front door. Cox and Mays were in there when we went in. They were behind the bar. I do not remember which one was at the front part of the bar. When we went in there we drank some more beer. We called for it and they set it out and we drank it and paid for it. I called for it and I guess I paid for it. I reckon Cox waited on us that time. I do not know for certain,—seems to me though that he did. Yes I know that we took beer,—keg beer. I do not remember

which one of them drew the beer. I do not remember what was said. I do not know that there was anything said, nothing
21 more than we called for what we wanted and they set it out, and we drank it. No we did not leave then, we stayed in there a good while. We sit down and stood up both, until we got to where I did not know what I was doing,—I got that way before I left that time. I do not know much about what took place after I got that way. There were a lot of beer kegs about the middle of the house, up next to the wall, and we set down on them some. I did know at the time who drew the beer but I have forgotten. The other boy sit down also and there was other men sitting down too. I remember that Charley Dasher and a man named Houck was there. I think we talked to them a little,—I am not for certain. We drank in there several times before we left. No I do not remember how many times we did drink before we left that time. I would say about four times. No I do not remember of getting up from the beer keg where I was sitting and coming up to the counter and calling for the drinks,—I remember it for awhile, but I soon got past remembering. We took the drinks sorter along like. I do not know whether we went back and sit down on the kegs after we took the drinks or not. When we were sitting on the kegs Cox and the bar tender were over behind the bar. I suppose they were waiting on other customers. I never paid much attention to them. I do not know whether they paid much attention to us or not. I do not know as they said anything to me. It was sometime along about that time that Cox brought that paper around there. It was while I was in there that time that I think the paper was first brought to me. I do not know when I signed that paper. Yes I testified before about it. No I did not then say that I knew when I signed it,—I said that I did not know. No I did not say then that I knew everything when I signed it. No I did not say that on the other trial,—for I did not know everything when I signed it. I was there in the saloon when Cox first come to me with that paper,—I do not remember where exactly in the saloon I was. I do not remember whether I was sitting on a keg or not. I was there somewhere about the middle of the saloon as I now remember. I do not know whether I signed it on a desk or on top of a beer keg. Cox told me he wanted me to sign the paper, and said some of them were out there in front cutting up about it, and that it would save
him, and I told him I would not sign it and I never signed it
22 then. I was pretty far along when he brought the paper to me, but I remember telling him the first time that I would not sign it. I do not know what the statement was,—I did not read the paper. Cox did not read it to me. No I did not read anything. He wanted me to sign it and I would not. No I did not know at the time I signed it that I was signing it. The reason I did not want to sign it was because I did not know what it was,—I did not know much about it. I do not know where I went to sign it. Cox first came to me with it when I was somewhere near the middle of the saloon, but I did not sign it then. I told him I would not sign it. I remember telling him that I would not sign it. I do not remember what he said. I do not remember when he came to me again,—I

do not know when I signed the paper. No I can't tell about the hour of the day it was when I signed the statement. I do not know where I was when I signed the paper, whether I was in the saloon or not. I do not know what I did next after I signed it. I got drunk and those fellows got me off home. Some of them told me it was the Gamble boys that got me off home,—I do not remember though who it was. Yes I had drank some before this time at Hico. Yes I had been drunk a time — two before. I bought the bottled beer and put it in my saddle pocket about the third time I was in the saloon. I do not remember which one of the men I bought the bottled beer from. I had not got very drunk when I bought the bottled beer. I do not remember how many bottles I got. I can't say how long that was before I left town and started home. I guess it was about a couple of hours before I left. I do not remember very much between the time I bought the bottle beer and the time I went home. Yes I bought a saddle in town that day. I had been in the saloon a time or two when I bought the saddle. I bought the saddle right after noon. Yes I bought it before I signed this statement. I do not know exactly when I signed the statement, but it was along in the evening some time. I guess I did ride out of town that evening. Yes since that time I have been indicted in Erath County, Texas, for malicious mischief and one thing another. There were several things that they had me charged with up there,—one of your witnesses that you had before was the cause of it. They had us up there for taking some lap robes. Yes I was con-
23 victed in two cases for theft.

Re-examined by the PLAINTIFF:

Yes Mays was waiting on the bar while we were in there. He was behind the bar. He had his hat off. Yes he was waiting on customers while we were in there. Yes He did that in the presence of P. O. Cox. Yes I got down some where on the road that night. I do not know how long I stayed down,—I got over it about ten or eleven o'clock that night. Yes my father had gotten after me for drinking and objected to me drinking.

Cross-examined by the DEFENDANT:

Yes before I went to Hico this time I had worked for other people than my father and received my own wages without consulting my father. Yes I had traded for myself before that. I bought a buggy from A. L. Phillips before that, and paid him part of it, and he took a lien on the buggy for the rest, and I signed my name to the note I owed him. I do not remember whether he took a mortgage on the buggy or not,—it was only for $15.00. Yes I made the trade in my own name and paid him all but fifteen dollars.

Re-examined by the PLAINTIFF:

I had seen Cox in Hico before then. I lived about eight or nine miles from Hico. No I do not know whether Cox ever knew about me working for myself or not.

Cross-examined by DEFENDANTS:

Sometimes I would go to Hico maybe twice a week and again I would not be there for a month. Hico was my trading point. I did not get my mail there.

Testimony of John T. Adams.

JOHN T. ADAMS, a witness for the plaintiff testified as follows:—My name is Jno. T. Adams. I live at Hico, Texas. I have lived in Hamilton County about twenty eight years. I know Mr. Thompson, the plaintiff. I have known him about seven years. I know his son, W. W. Thompson, and have known him about the same time. I have lived in Hico going on nine years. I saw W. W. Thompson in Hico on or about May 30" 1902. The first time I saw him he rode up in front of P. O. Cox's saloon, and got down and went in at the saloon door. At that time I was in the millinery department of Wm. Connolly's store. I suppose I stayed there some fifteen or twenty minutes. I did not see him come out while I was
24 there. During that time I was standing where I could have seen him had he come out at the front door. My attention about that time was called back in the store and I went back in there. I intended staying in the millinery department where I could see until he came out of the saloon, but my attention was called back in the store and I went back there without seeing him come out then. If I remember right it was then about one o'clock,—shortly after I come back from dinner. About half an hour after that I saw him riding up the street, and I went to the front of the Connolly building and called Mr. Welch's attention to him. I called Mr. Welch's attention to his manner of riding up and down the street, and I told Mr. Welch there was a boy under the influence of liquor already since our new saloons come in. I went to the Southeast corner of the building where I could watch him as he went back to the saloon, and he rode up there and got off and went into the saloon again, and Mr. Welch and I stood there and watched him. I think we stood there somewhere in the neighborhood of twenty or thirty minutes. I took out my little book and put the date down in it so that I would not forget it. Yes he rode up and got off his horse, and went into the saloon, and was in there twenty or thirty minutes, and then he come out and got on his horse and rode along in front of Mr. Connolly's grocery store. As he come out of the saloon that time he had two bottles of beer and he put one each in his saddle pockets. I think they were pint beer bottles. Later in the evening I saw the boy again as I went home,—he come out of the saloon door and got on his horse and Mr. Anderson Gamble was helping to get him on and start him towards home. I observed the boy's conduct at that time. It seems to me that any one that had observed the boy's condition would have said at once that he was drunk,—he could not ride straight and his conduct in town would prove to any one that he was drunk. I have known the boy about seven years,—that was two years ago when he was here in Hico on that occasion. Yes at that time I observed the boy with reference to his age. From his

appearance and general conduct of course I would not have taken him to be twenty one years old then. That was the reason I watched him that day, and took out my book and put down the date,—I was satisfied he was under age. The last time I saw him that day was as I went home in the evening.

Cross-examined by DEFENDANTS:

At the time I am speaking of I had been at work for Mr. Connolly about four years. Yes after that I went to see the plaintiff in this suit, and I talked with the old gentleman and with the boy. Yes I talked to the plaintiff with reference to bring- this suit on the liquor dealers' bond. I did not persuade W. B. Thompson to bring this suit. I told him just what I had seen concerning this boy. It was about twelve miles up to where Mr. Thompson lived and I quit my work to go up there and tell him about it. Yes I quit my labor to go out there and do what I considered to be my duty and to help the officers of my County to do their duty. Yes that was to bring this suit. I understand that there could be two cases of it. Yes I understood that this case was to be a civil suit and another a criminal case. No I did not go out there to persuade him to bring a civil suit. I did tell him he could do it. Yes I was working for Mr. Connolly at the time I observed the boy's conduct and put the date of it down. From the first time that I noticed the boy there in Hico, together with the time I watched him and then until I got through with Mr. Chesley, the County Attorney, about the matter, I had taken off about half a day from my work. Yes I put in that time there spying around. As well as I remember the first time in the day I saw the boy was about one o'clock,—it might have been a little before that time, but it was right after I come back from dinner. At that time I had an idea that he was drinking,—he did not show any appearances of being drunk though at that time. The first time on that day I saw him, I saw him ride up and go into the saloon. No when he went in there the first time there was no indication that he was drunk. No as he come out the first time I could not discover any change in him. The first time I saw him I was in the millinery department of Wm. Connolly's store. It was right across the saloon from the street,—I suppose it is about sixty steps between them. No it is not straight across the street—it is kinder catty cornered. I stood there in the door of Connolly's millinery department,—there were some ladies in there and I called Mr. Connolly's attention to it, and we were talking about it. I was not waiting on any customers then.—I had just come in from dinner and I stood there and watched until my attention was called back in the store. I stood there and watched some fifteen or twenty minutes to see if I could see him come out of the saloon. I could not see what the boy did after he entered the front door of the saloon. Yes I think there were back doors to the saloon. Yes there is a side door to the saloon on another street. The boy came out the same way he went in. I do not know whether Cox or any of his bar tenders saw him in the house or not. All I know I saw him enter the *the* front door, and he was out of my sight for at least fifteen or twenty

minutes, for I watched for that purpose. No when he came out of there I could not discover any change in his condition. After he come out he got on his horse and went down in front of Mr. Phillips' and got down and went in, and I am pretty sure that he bought a cow whip. My attention had been called back in the store and after I got through, I went around to the front door and was standing talking to Ed Gamble when he come on down to Phillips' and I think got a cow whip and then come on up in front of the grocery store. Yes I was still watching him. I called Mr. Welch's attention to it, and the boy went to the saloon and went in again and when he did I began to discover then that he was under the influence of whiskey. No his riding before that had not indicated that he was drunk. He got the beer and put it in his saddle pockets the second time I saw him go in there. When he went back the second time I was standing at the Southeast corner of Mr. Connolly's store where I could see up the street. I saw the boy ride up from Phillips' and ride up to the saloon and get down and go in, and when he come out of the saloon the second time he had two bottles of beer; he put one in each of his saddle pockets. Myself and Mr. Welch stayed there twenty or thirty minutes watching him. Yes he was able then to get on his horse himself. He talked a little loud and made a motion to holler, and got on his horse and called Jno. Hill pretty loud and I told Jno. Hill "you ought to try to get Will to go home." He talked to him and we stood and watched him, until he went back in the saloon and then I did not see him any more for a little while, and that was when I went home. He come out of the saloon about that time, and Mr. Gamble talked to him and got him on his horse,
and he went up the road ahead of me in a lope. Yes I knew
27 him well and I knew his father well. The reason I did not interfere with him and keep him out of there was that I preferred the law to attend to such as that. I had no right to go into any man's house and interfere. Yes I saw him around on the street a time or two as I have stated and knew he was getting drunk, but I did not think I was the right man to interfere with him. Yes I simply went from room to room of the Connolly building and out of the streets and watched him. No I did not see any one sell him anything in the saloon. I do not know whether he set down in there or not. Yes he might have walked out of the saloon at the side door. No I could not see in the house. My estimate of the time is just simply an estimate. I am not extraordinarily anxious that the plaintiff should win in this suit,—all I want to see is the right,—and for the law to be carried out. Yes I think it was right for me to take up the time while I was there employed by Mr. Connolly in watching this boy as I did. I asked Mr. Connolly's permission and he granted it. I suppose I must have put in an hour and a half or maybe two hours there that evening watching him. I am satisfied I paid particular attention to the matter there for at least two hours. No I did not go to the boy and say anything to him. Yes I saw Anderson Gamble trying to get him on his horse and get him off home. I never saw the boy there drunk before or since then. Of course I do not know what was in the beer bottles he brought out and put in

his saddle pockets, but I think I know what a beer bottle is. Of course if he had those beer bottles filled up with water I could not have told it from where I was. But I am sure it was beer in them as far as that is concerned,—I did not see or taste it but I am sure it was beer. Yes I am sure it was beer by the looks of it. The first time I saw the boy was right close to one o'clock. When he went out of town it was late in the evening,—I saw him when he was leaving town,—the second time I saw him that evening was between 2:30 and three o'clock. I must have watched him then for twenty or thirty minutes and then he went back into the saloon and when he went in there the last time, I did not see him come out, but I saw his horse several times, and I watched pretty close. When I started home late that evening I saw him come out of the saloon and there were two or three trying to get him to go home, Anderson Gamble was the man that got him started off home. He had been in
28 the saloon a long time that time before he came out. No I did not see him in the saloon. I merely saw him go in and come out. More than that I do not know. That is all that I can testify to,—that I saw him go in and come out as I have stated.

Re-examined by the PLAINTIFF:

At the time I went with Mr. Chesley up to see Mr. Thompson about this matter Mr. Chesley was then County Attorney of Hamilton County. I understood that the State could prosecute a suit about the matter. I went up to Mr. Thompson's with Mr. Chesley and introduced Mr. Chesley to him, and told him that Mr. Chesley was County Attorney, and that I claimed to be a law abiding citizen, and that Mr. Chesley did not know the way up to his house, and I come along with him, and I told him what had happened in Hico about his boy, and told him Mr. Chesley could tell him what the law was about it, and he could do just as he pleased about it, and then I asked the boy several questions in their presence, and left matters with Mr. Thompson and Mr. Chesley I saw the boy on the day he was in Hico go into that saloon three times. The first time I saw him go in when I was in the millinery department of Connolly's store, and Mr. Connolly stood there a good little while watching, and I was there fifteen or twenty minutes. The second time Mr. Welch and I stood at the corner about twenty or thirty minutes watching him, I am sure it was thirty minutes. The third time when I saw him go in I stood there ten or fifteen minutes, and it was not more than an hour or such matter until I started home, and about the time I started home he come out of the saloon.

Cross-examined by the DEFENDANTS:

When I went up there with Mr. Chesley I understood he was going up there to investigate the matter. No Mr. Thompson does not live in this county,—he lives in Erath County. No I did not understand that Mr. Chesley could prosecute Erath County cases, but I went to Erath County with him to see a man who had a case in this county. I was satisfied that there would be two cases brought about it.

Re-examined by the PLAINTIFF:

Yes of course I understood that Mr. Chesley could prosecute any suit that arose in Hamilton County.

Testimony of J. E. Welch.

J. E. WELCH, a witness for the plaintiff testified:—My name is J. E. Welch. I live in Hico, Texas and have lived there about twelve years. I was there about May 30th 1902. I knew the plaintiff, W. B. Thompson, and his son, W. W. Thompson. I saw him in Hico about May 30th 1902. I saw him on the streets in Hico. When I saw him Mr. J. T. Adams was with me. On that day I saw W. W. Thompson go into P. O. Cox's saloon. Yes I saw him come out of that saloon. From the time he went in there until he come out was about ten or fifteen minutes. At that time I was in Connolly's millinery establishment, I saw him after that. At that time I was in front of Mr. Connolly's house on the corner there. I saw him go back into Cox's saloon that time. Yes I saw him come out. It was about twenty five or thirty minutes from the time he went in until he come out. I saw him again after that. I saw him get on his horse and ride in front of Mr. Connolly's store. I observed his saddle pockets then, he had two bottles in them. They were round bottles. He brought the bottles out of the saloon with him and put them in his saddle pockets, and after that I saw them in the saddle pockets. I saw him ride down about in front of Phillip's and then I did not see him any more. Yes I observed his general appearance at the times I have stated. I observed his size and conduct. From my observation of him I would not have taken him to be twenty one years old at the time. I had not seen him before that day.

Cross-examined by DEFENDANTS:

It was along about two or three o'clock in the day when I first saw this boy. Yes Jno. Adams and myself were in Connolly's millinery establishment. John Adams first called my attention to the young man. There was nothing unusual then in his appearance only going into the saloon. No I could not and did not see him after he entered the door. No I do not know whether he saw any one or any one saw him inside the saloon or not. It was about ten or fifteen minutes before he came out. No I do not know what was being carried on in the saloon at that time. No I could not see whether he bought anything or not after we went in there. I think there is a side door and a back door to that saloon. He could
30 have gone out at either of those doors and me not have seen him. Some little bit after that we were around on the corner by Mr. Connolly's store, and he went in again and we talked about it. I think about half an hour intervened between the first time I saw him come out and the second time I saw him go in. When I first saw him he was walking. I could not say that there was any one with him, for I do not remember. There were several around there. Yes something like a half hour after that I saw him go in

the second time. He was on his horse when he come up that time. I do not remember from what direction he come,—he just rode up and hitched his horse and went in the saloon. There were several people present about the saloon, but I do not remember any of them. Mr. Adams and I were standing about Connolly's corner when we saw him ride up there the second time. The saloon is diagonal across the street from that corner,—I do not know the distance. It was about twenty five or thirty minutes from the time he went in then until we saw him come out. Mr. Adams and I did not do anything during that time only stand there and talk. No I could not see him after he went into the saloon. No I do not know whether he got anything from any one in there or not. No I do not know whether or not he went out the back or side door,—I could not have seen him if he did. All I can say is that I saw him go in the main front door and then saw him come out the same door in about twenty five or thirty minutes. I could not tell from his action when I saw him then whether or not he was under the influence of whiskey,—he was too far from me,—that was the first time, and he was down on the ground going into the saloon. When he come out of the saloon and put the bottles in his saddle pockets he acted like he was drinking, he talked a good deal like a drinking man and when he got on his horse he reeled in his saddle,—he was going on like a drunk- man. Yes I heard him call Jno. Hill. He did not stay there in front of Connolly's store over two or three minutes. He then went towards Mr. Phillip's. I could not tell whether he got off his horse there or not,—I lost sight of him about the time he got down there. I quit watching him, for I thought that I had seen about enough of him. I did not see Anderson Gamble start him home. No if the boy had made a statement in writing to me that he was twenty
31 one years old on that occasion I would not have believed it, he looked to be a boy all the time.

Re-examined by the PLAINTIFF:

When I saw him come out of the saloon he came out the same way that he went in.

Testimony of T. S. McKinley.

T. S. McKINLEY, a witness for the plaintiff testified: I was formerly Sheriff and Tax Collector of this County. I know P. O. Cox, one of the defendants in this suit. I remember the circumstance of this case being tried here before. I had a conversation with P. O. Cox about this case before the first trial I think the conversation occurred in Main & Chesley's office. He made a statement to me with reference to how many times young Thompson had been in his saloon that day before he got him to sign a statement. He said he had been in his saloon three or four times that day before he got him to sign the statement. He said he was in there at least eight or ten times that day.

Plaintiff rests.

Testimony of John May.

JOHN MAY, a witness for the defendants testified:—My name is John May. I live at Comanche Texas. In May 1902, I lived at Hico Texas, and was tending bar for Cox & Co. I remember the circumstance of a young man named Thompson coming into the saloon about the latter part of May 1902, while I was bar tender there. When he first come in I asked him if he was twenty one years old. He said that he was. There was another fellow with him,—I think his name was McFadden. He said yes that is right or something like that. As well as I remember I sold him some beer. From his appearance and from his statement I believed that he was twenty one years old. After he drank the beer he went out. I do not remember at which door he came in or at which one he went out. In a short time he come back again. As well as I remember the same man was with him this time. I believe I asked him again this time if he was twenty one years old, and he claimed he was twenty one the same as he did before. I asked him that once or twice,—I won't be sure about that. Mr. Cox told me not to sell any minor whiskey. After he told me and after the other man told me he was twenty one I believed that he was. I could not say positively how many times he came in
32 there that day,—he came in several times. Later on Mr. Cox drew up a statement and wanted him to sign it and I believe he refused to sign it at first, and later on signed it as well as I remember. In was in the evening some time when Mr. Cox presented him the statement to sign. I did not at any time see him sitting around there. I do not think he sit down while he was in the saloon,—if he did I did not see him. No I can't tell you how many times he come in there that day. I do not remember whether he bought any whiskey that day or not,—he might have drank whiskey part of the time. As well as I remember he carried some bottle beer off with him when he started home,—I think he put it in his saddle pockets. I do not remember how many bottles he had. Yes I had had experience before that as a bar-keeper. From the young man's appearance, demeanor, and looks, and conduct, together with his statement to me that he was twenty one years old, I believed that he was twenty one years old.

Cross-examined by the PLAINTIFF:

I am not doing anything at Comanche now. The reason I asked his age when he come in, was that when a young looking fellow comes in it is natural to ask him his age,—if he is twenty one. I was a little bit suspicious when I first saw him come in. Yes I asked him his age on that account. Yes I believed I asked him if he was twenty one years old the second time he come back. Yes he told me then he was twenty one years old. Yes then Mr. Cox got suspicious and prepared a written statement for him to sign and at first he refused to sign it, but later on signed it. Yes I testified once in this case before. I cannot say how long he stayed in there after he took his first drink,—he did not stay so very long. He stayed there at

the bar a few minutes and was talk- to people in there,—I was busy though and did not pay much attention to him,—but he did not stay in there so very long. No he did not turn immediately around and walk out as soon as he got the drink,—he did not stay there though over three or four minutes. I can't tell you how many times he come in there that day. I guess he was in there as many as four or five different times during the day. Q. Each time he would come in there he would drink and stand around and talk? A. No- every time. Q. Some times he would do that? A. He did not
33 stand around long. I do not remember exactly what I testified before. I am just testifying as near as I can remember it now. Yes the young man did talk to some parties in there. No, I am not certain as to how many times he was in there that day,—he would come in and go out again. At that time I was employed by Cox as a bar tender. Yes young Thompson paid for the drinks. The other fellow that was with him was named McFadden. I believe they kinder taken it time about paying for the drinks. Yes I know that all the drinks were paid for. I am not certain though that Thompson paid for all of them. When Cox got him to sign this statement he had been in there a short time that time, and then Cox went to him with the statement. After he signed that statement I think he went out again. After he signed that statement I do not know whether Cox cared if he stayed in there or not,—I didn't if Cox didn't. After he made the statement if it was al- right with Cox it was al- right with me for him to stay in there. No I did not object to his coming in the house. I did not hear Cox object to it. I did not try to expel him from the house. I did not hear Cox try to expel him. I heard part of the conversation between Cox and Thompson when he got him to sign the statement. I did not hear Cox tell him that there were some people on the outside complaining, and if he would sign the statement it would save him. No I did not hear all the conversation. I was waiting on the bar.

Re-examined by the DEFENDANTS:

Certainly the reason I did not invite Thompson out the first time when he come in, was that he told me he was twenty one years old. Yes that time he stayed there at the bar a few minutes. I do not remember whether he handed me the exact change or whether I had to make change. I do not remember what time in the day it was that Cox asked him to sign this statement,—it was some time in the evening. We sold whiskey drinks there for a bit (12½¢). Once in a while we sold it at 10¢,—if a man would lay down a dime we would take it. I expect we charged Thompson a bit a drink. It was pretty late in the evening when Thompson was in there the last time. I do not remember whether McFadden come back with him each time or not.

Cross-examined by the PLAINTIFF:

He did not get to talking very loud in the house. I do not
34 remember that Mr. Cox went to him and asked him to get quiet. I do not know that he was very full that evening,—I

have seen men lots fuller than he was. I expect he was a little bit full. Yes he was in that condition when he left that evening.

J. A. GAMBLE, a witness for defendants testified:—My name is J. A. Gamble. I live in Hico, Texas. I have lived there for about twelve years. I remember about May 30" 1902 of seeing W. W. Thompson there in Hico in Cox's saloon. I saw him sign a statement in writing that day. That statement you exhibit to me is the statement,—it was signed by me as a witness. Yes Thompson signed that statement. I had just stepped into the saloon and soon after I went in Mr. Thompson come in, and when we walked in he asked me to go & take a drink with him, and I told him alright and we walked to the bar and Mr. Cox called him back from the bar and said a few words to him, and he just turned around and remarked that he did not have to sign anything to get what he wanted to drink, that he could get it without signing anything, and Cox said "well you can't get it here." He said you can't get anything else here, or nothing else here without signing it,—that he did not know that he was twenty one years old, or something to that amount. I think I asked Mr. Cox myself what it was and he said it was a certificate stating the young man's age. I told the boy "if you are twenty one years old, there is nothing wrong in signing the statement, but if you are not I would not sign it." He said "O, hell, if that is all I will sign it, and walked back and signed his name to it, and Cox asked me and Farrow if we would witness it and we did. Thompson then walked back to the bar and we got the drink. He did not stay in there over ten minutes after that, if that long. I do not suppose we were in there over ten minutes, and Thompson then walked out to his horse. He stood there about his horse for some ten or fifteen minutes, and then got on his horse and galloped off up the street and that was the last I saw of him. I observed the young man at the time of the signing of this statement, and from his appearance, demeanor and conduct, I believed him to be over twenty one years old.

35 Cross-examined by the PLAINTIFF:

If he had not signed this statement, I would have just believed that he did not want to sign it. Just looking at the boy I would have taken him to be twenty one years old, independent of the statement. No he did not look to be as much as twenty five years old. Yes he looked young to be in a saloon. He was under the influence of whiskey when I saw him. Yes he was talking pretty loud. We did not talk more than two or three minutes after we drank, and he then went out of the house,—no one took him out. I was there with him before we drank just a few minutes. I was renting the building to Cox then. I did not see the boy on any other occasion in that saloon that day. He and I drank whiskey together. I did not pay for it.

The defendant offered in evidence the following statement:

Statement offered in Evidence by Defendants.

HICO, TEXAS, —— —, 190–.

"M..... To Favorite Saloon, Dr: Fine Wines, Liquors, and Cigars, Keg and Bottle Beer.

This is to certify that I am twenty one years of age, this the thirtyth day of May, 1902.

W. W. THOMPSON.

Witness,
H. FARROW.
J. A. GAMBLE."

Testimony of J. W. Newsome.

J. W. NEWSOME, a witness for defendant testified:—My name is J. W. Newsome. I live at Hico and except for two years have lived here since 1893. I work for Mr. A. L. Phillips. I was acquainted with W. W. Thompson in May 1902. He was in the store that day and we dealt with him. From his manners, appearance, and general demeanor, on that day I would judge him to be twenty one years old. We sold him a buggy before that and he paid part of it and gave his note for the balance.

Cross-examined by PLAINTIFF:

We are very particular about not selling to a boy Yes where we would sell a buggy and get all but $15.00 down we would still be very particular about selling to a boy. No we would not sell to a minor if he was to come in and pay all but $15.00 down,—our rules would not permit it. Mr. Gamble sold him the buggy,—he did not pay all of it but $15.00. He paid $50.00 and the balance was $50.00, and he come in afterwards and paid all of that balance but $15.00 he paid all but $15.00 the day he was in town painting it
36 red. I would take the boy to be twenty two or three years old. Yes I used to be in the saloon business myself. I do not know how old the boy was then. I did not ask him. I am pretty well acquainted in Hico. It seems to me like Cox was there a short time before he went into the saloon business. He come there from Comanche, Texas. No he had not been a resident there. He come there just before he put in the saloon business.

End of the case.

Agreement of Counsel to Statement of Facts.

We, Main & Chesley, Attorneys for the plaintiff, and Dewey Langford, Attorney for the defendants in the above entitled and numbered cause, hereby agree that the above and foregoing is a true and correct statement of the facts proved on the trial of said cause and

respectfully ask that the same be approved and ordered filed as a part of the record in said cause.

MAIN & CHESLEY,
Attorneys for the Plaintiff.
DEWEY LANGFORD,
Attorney for the Defendants, P. O. Cox, Sam Levy and W. M. Evans.

Judge's Approval of Statement of Facts.

I, N. R. Lindsey, Judge of the 52" Judicial District of Texas, certify that I have examined the foregoing approved statement of facts, and that I find same to be correct, and I approve the same and order the same filed as the statement of facts in said cause.

Witness my hand this April 9" 1904.

N. R. LINDSEY,
Judge 52" Judicial District of Texas.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Statement of Facts. Filed Apr. 12th, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

General Charge of the Court.

Filed March 22, 1904.

In the District Court of Hamilton County, Texas, February Term, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

GENTLEMEN OF THE JURY: In this case the plaintiff W. B. Thompson sues the defendants P. O. Cox, Sam Levy and W. M. Evans to recover statutory penalties for alleged breaches of the defendant P. O. Cox liquor dealer's bond.

The defendants deny all and singular the allegations in plaintiff's petition and plead in addition that if P. O. Cox, his agents
37 or employés ever sold, or gave, or permitted any intoxicating liquors to be sold or given to W. W. Thompson, that the same was sold and given to said Thompson in good faith, with the belief, and having good grounds for said belief, that said W. W. Thompson was twenty one years of age, and if the said W. W. Thompson did enter and remain in the saloon of the said P. O. Cox, said entering and remaining was for the purpose of procuring intoxicants and that he, the said W. W. Thompson remained in said saloon no longer than was reasonably necessary to procure said intoxicants, which was sold to him by P. O. Cox, his agents and employés in good faith,

they believing and having good grounds to believe that said W. W. Thompson was above the age of twenty one years.

Now, if you believe from a preponderance of the evidence, that the defendant P. O. Cox, on or about the time alleged in plaintiff's petition, procured a license and executed and filed the bond in evidence before you and that thereafter he engaged in the business of a retail dealer under said license and bond in Hico, Hamilton County, Texas, as alleged in plaintiff's petition, and if you further believe from a preponderance of the evidence that on or about the 30th of May 1902, and while the defendant P. O. Cox was so engaged as a retail liquor dealer under said license and bond, in Hico, Hamilton County, Texas, (if he was so engaged) the said defendant P. O. Cox, his agents or employés knowingly permitted W. W. Thompson to enter and remain in his house or place for selling spirituous liquors, and if you further believe from a preponderance of the evidence, that the said W. W. Thompson was then and there a person under the age of twenty one years and that the plaintiff, W. B. Thompson is his father and that the said W. B. Thompson did not consent for the said W. W. Thompson to enter and remain in said defendant Cox's house wherein said Cox conducted the business of a retail liquor dealer (if he did so) then you will find for the plaintiff under paragraph 3 of his petition and assess his damages at five hundred dollars for each time you find that said W. W. Thompson was so permitted to enter and remain in said house, not to exceed the number of times alleged in said paragraph 3 of plaintiff- petition.

If you do not so find from the evidence you will find for the defendants, on the issue of W. W. Thompson entering and re-
38 maining in said house or place of business as alleged in paragraph 3 of said petition, and in this connection you are further instructed: If you believe and find from the evidence that the said W. W. Thompson was, on the 30th day of May, 1902 a person under the age of twenty one years, and that the said W. B. Thompson, plaintiff herein is his father, and that the said W. W. Thompson was on or about the said 30th day of May, 1902 permitted by the defendant P. O. Cox, his agents or employés, to enter and remain in the saloon or place of business of the said P. O. Cox, as alleged by plaintiff, but if you further believe and find from the evidence that the said W. W. Thompson entered said saloon for the purpose of procuring intoxicating liquor, and that the said defendant P. O. Cox, his agents or employés sold the said W. W. Thompson intoxicating liquors, but at the time said liquor was sold to him the person selling said liquor to the said W. W. Thompson did so in good faith, believing at the time of said sale, if any, that the said W. W. Thompson was then twenty one years of age, and that the person making said sale, if any, then had good grounds to believe that the said W. W. Thompson was twenty one years of age, and if you further believe from the evidence that the said W. W. Thompson on said occasion did not remain in said saloon for a longer time than was reasonably necessary, under the circumstances, to procure said liquor, that is, if the said W. W. Thompson remained in said saloon for such a length of time only as was reasonably necessary for him under the circumstances to purchase the liquor, drink and pay for

the same, you will find for the defendants on the issue of the sa
W. W. Thompson entering and remaining in said saloon; but y
are further instructed in this connection, if you believe and find fr
the evidence that the said W. W. Thompson after entering the sa
saloon of the defendant P. O. Cox (if he did so) loitered or remain
in said saloon, with the knowledge and consent of the said Cox, h
agents or employés for a longer time than was reasonably necessa
under the facts in this case for him to purchase, drink and pay f
the liquor for which he entered, and that he was then under the a
of twenty one years, and that W. B. Thompson is his father and d
not consent to said entry, you will find for the plaintiff, and ass
his damage as hereinbefore directed.

Upon the issue of the sale by the defendant P. O. Cox, his agen
or employés of intoxicating liquors to the said W. W. Thompso
you are charged: If you believe and find from the preponde
39 ance of the evidence, in this case that after the defendan
executed the bond in evidence before you, and after the d
fendant P. O. Cox, engaged in the business of a retail liquor deal
under said bond in Hico Hamilton County Texas, if he did so, th
he the said P. O. Cox, his agents or employés sold in the saloon
place of business of the said P. O. Cox, intoxicating liquor to W. W
Thompson on or about the 30th day of May 1902, and that the sa
W. W. Thompson was then and there a person under the age
twenty one years, and that the plaintiff herein W. B. Thompson
the father of the said W. W. Thompson, and that he the said W.
Thompson, plaintiff herein, did not consent to such sale, if any, th
if you so believe you will find for the plaintiff under paragraph 4
his petition, and assess his damage at five hundred dollars for ea
sale, if any, to the said W. W. Thompson, not to exceed the numb
of sales alleged in said paragraph 4 of plaintiff's petition; but in th
connection you are instructed: If you believe from a preponderan
of the evidence that the defendant P. O. Cox, his agents of employ
sold intoxicating liquor to the said W. W. Thompson as alleged i
plaintiff's petition, and that the said W. W. Thompson was then
person under the age of twenty one years, at the date of such sal
if any, but if you further believe from the evidence that the perso
making such sale did so in good faith with the belief that the sa
W. W. Thompson was then twenty one years of age, and you furth
believe from the evidence that such person making such sale, if an
then had good grounds for such belief, you will find for the defen
ants on the issue of sale of intoxicating liquor to said W. W. Thomp
son.

You are further instructed that whiskey and beer are each intox
cating liquors within the meaning of this charge.

If you find for the plaintiff, you will state in your verdict the num
ber of infractions, of the bond, in evidence before you, that you ma
find, and assess plaintiff's damage at five hundred dollars for eac
infraction and you will also state what infractions if any you fin
that is, if for entering and remaining, so state, or if for a sale o
sales so state, or if for each, so state, giving the number in each in
stance, if any, of each infraction.

You, gentlemen, are the exclusive judges of the facts proved, o

the credibility of the witnesses and the weight to be given to the testimony but you are bound to receive the law, from the
40 Court, which is here given to you, and be governed thereby.

N. R. LINDSEY,
Judge 52" Judicial Dist.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* General Charge of the Court. Filed M'ch 22d, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

Instruction Asked for Defendants.

Filed M'ch 22", 1904.

In the District Court of Hamilton Co., Texas.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Now comes the defendants herein by att'y and ask the Court to charge the jury as follows: You are instructed that under the law making a sale of beer or whiskey to a minor, if any was made, by P. O. Cox, there can be but one infraction of the bond; that is, if P. O. Cox, his agents or employés, sold intoxicants to the alleged minor under conditions that would be a violation of the terms of his liquor dealer's bond, you could not for the same transaction find that there was a violation also of the condition of the bond for permitting the minor to enter and remain unless you should believe from the evidence that after procuring the whiskey or beer, (if he did so) he then loitered or remained in defendant Cox's saloon or place of business with the knowledge and consent of the said Cox, his agents or employés, for a longer time than was reasonably necessary to procure said whiskey or beer.

N. R. LINDSEY,
Judge 52d Judicial Dist.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Instruction asked for defendants. Filed 22" day of M'ch, 1904. R. C. Cornelius, Clerk Dist. Court Hamilton Co. Texas.

Special Instruction No. 1 Requested by Defendants.

Filed M'ch 22", 1904.

In the District Court of Hamilton County, Texas, February Term, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Now come the defendant herein by attorney and ask the Court to charge the jury as follows: You are instructed that under the law in making a sale of beer or whiskey to the minor, if any was made, by P. O. Cox or his agents or employés, there can be but one infraction of the bond; that is, if P. O. Cox, his agents or employés sold intoxicants to the alleged minor under conditions that would be a violation of the terms of his liquor dealer's bond you could not for the same transaction find that there was a violation also of the condition of the bond for permitting the minor to enter and remain.

41

DEWEY LANGFORD,
Attorney for the Defendants.

Refused. This charge was given with an addition thereto as will appear in the record.

N. R. LINDSEY, *Judge.*

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Special Instruction No. 1, requested by defendants. Filed 22" day of M'ch, 1904. R. C. Cornelius, Clerk Dist. Court Hamilton Co. Texas.

Verdict and Judgment.

In District Court of Hamilton County, Texas, February Term, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Now on this the 21st day of March, 1904, this cause came on to be heard, and the plaintiff appeared in proper person and by attorney; and also came the defendants in person and by attorney and both parties announced ready for trial. Then came on to be heard the exceptions of the defendants, general and special to the plaintiff's petition, and the Court having considered same and having heard

the argument of counsel thereon and being advised as to the law applicable thereto, overruled said general and special exceptions to which action of the Court in overruling same, the defendants in open Court excepted.

The- came on to be heard the plaintiff's general and special exceptions to the defendants' answer and the Court having heard and duly considered same, and the argument thereon, and being advised as to the law, overruled the said plaintiff's exceptions to which action of the Court the plaintiff in open Court excepted; and a jury having been demanded, a jury of twelve (12) men, to wit, J. J. Applewhite and eleven others were duly and legally drawn, sworn and empaneled to try this case and said jury having heard the evidence and the argument of counsel for both plaintiff and the defendants, and having heard read and received the charge of the Court together with the pleadings of the parties, retired to deliberate upon their verdict; and afterwards, to wit, on the 22nd day of March, 1904, returned into open Court the following verdict, which was duly and legally
42 received and filed by the Clerk of this Court, to wit, "We, the jury find for the plaintiff six infractions of the Liquor Dealer's Bond sued on, 3 for sales, 3 for permitting the minor to enter and remain in place of business of d'f't Cox. We assess the damage at Five Hundred Dollars in each case and in the aggregate $3000.00.

J. J. APPLEWHITE, *Foreman.*"

Wherefore, it is the opinion of this Court that in accordance with said verdict of said jury, that the plaintiff, W. B. Thompson, should have and recover of and from the defendants P. O. Cox as principal, and Sam Levy and W. M. Evans as sureties, jointly and severally the sum of $3000.00 and the costs of this suit.

It is therefore ordered, adjudged and decreed by the Court that the plaintiff, W. B. Thompson do have and recover of and from the defendants P. O. Cox as principal and Sam Levy and W. M. Evans as sureties, jointly and severally the sum of $3000.00 damages for six infractions of the Liquor Dealer's Bond sued on as found by the verdict of said jury together with 6% interest thereon from this date and for all costs in this behalf incurred, for which let execution issue against the said P. O. Cox, Sam Levy and W. M. Evans, or against either of them.

Defendants' 1st Amended Original Motion for a New Trial.

Filed March 25th, 1904.

In the District Court of Hamilton County, Texas, February Term, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Now come the defendants in the above styled and numbered cause by attorney and under leave of Court files this Defendants' 1st Amended Motion for New Trial to take the place of their Original Motion filed herein on to wit, the — day of March 1904, and for amendment Def'ts pray the Court to set aside and hold for naught the verdict of the jury and judgment of the Court thereon rendered on, to wit, the 22nd day of March 1904 and grant them a new trial, for the following reasons.

1st. The Court erred in overruling defendants' demurrer to the effect that the section regulating the sale of liquor and prescribing the tax and penalty is unconstitutional, construed in connection with Art. 5060*i*, in that said Article exempts from the provisions
43 of the statute people engaged in the same business to wit, selling intoxicating liquors provided they sell wines produced from grapes grown in this state by the seller. Because said act regulating the sale of liquor and providing a tax and penalty *is* unconstitutional and repugnant to the 14th Amendment of the Federal Constitution, providing that no State shall deny to any person within its jurisdiction the equal protection of the law. And the effect of said act when construed in connection with Art. 5060*i* is to deny to persons within the jurisdiction of the state of Texas the equal protection of the laws.

2nd. The Court erred in giving to the jury the following paragraph in his charge: "Now if you believe from a preponderance of the evidence that the defendant P. O. Cox on or about the time alleged in plaintiff's petition procured a license and executed and filed the bond in evidence before you and that thereafter he engaged in the business of a retail liquor dealer under said license and bond in Hico Hamilton County Texas as alleged in plaintiff's petition, and if you further believe from a preponderance of the evidence that on or about the 30th of May 1902, and while defendant P. O. Cox was so engaged as a retail liquor dealer under said license and bond, in Hico Hamilton County Texas (if he was so engaged) the said defend*nat* P. O. Cox, his agents or employés knowingly permitted W. W. Thompson to enter and remain in his house or place for selling spirituous liquors, and if you further believe from a preponderance of the evidence, that the said W. W. Thompson was then and there a person under the age of twenty one years, and that the plaintiff

W. B. Thompson is his father and that the said W. B. Thompson did not consent for the said W. W. Thompson to enter or remain in said defendant Cox's house wherein said Cox conducted the business of a retail liquor dealer (if he did so) then you will find for the plaintiff under paragraph three of his petition and assess his damages at five hundred dollars for each time that you find that said W. W. Thompson was so permitted to enter and remain in said house not to exceed the number of times alleged in said paragraph three
44 of plaintiff's petition" "because said charge is defective and misleading in stating to the jury that they would find for plaintiff W. B. Thompson if he did not consent for the said W. W. Thompson to enter or remain in said saloon, instead of stating to the jury that the parent W. B. Thompson must consent for said minor to enter and remain in said saloon. And because it was prejudicial error for the court to refer the jury to paragraph three of plaintiff's petition if they should find for plaintiff and therefrom assess the damages, and because said charge is confused and misleading.

3rd. The court erred in giving to the jury the following charge "And in this connection you are further instructed, if you believe and find from the evidence that the said W. W. Thompson was on the 30th day of May 1902 a person under the age of twenty one years, and that said W. B. Thompson plaintiff herein is his father, and that said W. W. Thompson was on or about the said 30th day of May 1902 permitted by the defendant P. O. Cox, his agents or employés to enter and remain in the saloon or place of business of the said P. O. Cox, as alleged by plaintiff, but if you further believe and find from the evidence that the said W. W. Thompson entered said saloon for the purpose of procuring intoxicating liquor, and that the said defendant P. O. Cox, his agents or employés sold the said W. W. Thompson intoxicating liquors, but at the time sail liquors was sold to him the person selling said liquor to the said W. W. Thompson, did so in good faith believing at the time of said sale, if any, that the said W. W. Thompson was then twenty one years of age, and that the person making said sale, if any, then had good grounds to believe that the said W. W. Thompson was twenty one years of age, and if you further believe from the evidence that the said W. W. Thompson on said occasion did not remain in said saloon for a longer time than was reasonably necessary under the circumstances to procure said liquor, that is if the said W. W. Thompson remained in said saloon for such length of time only as was reasonably necessary for him under the circumstances to purchase the liquor, drink and pay for the same, you will find for the defendant on the issue of the said W. W. Thompson entering and remaining in said saloon, but
45 you are further instructed in this connection, if you believe and find from the evidence that the said W. W. Thompson after entering the said saloon of the defendant P. O. Cox (if he did so) loitered or remained in said saloon with the knowledge and consent of the said Cox, his agents or employés for a longer time then was reasonably necessary, under the facts in this case, for him to purchase, drink and pay for the liquor for which he entered and that he was then and there under the age of twenty one years, and that

W. B. Thompson is his father and did not consent for said entry you will find for the plaintiff, and assess his damages as hereinbefore directed" "because said charge is on the weight of the evidence and attempts to tell the jury what facts will constitute entering and remaining within contemplation of law. And because said charge instructs the jury that if the alleged minor loitered or remained in said saloon with the knowledge and consent of the said Cox his agents or employés for a longer time than was reasonably necessary for him to purchase drink and pay for the liquor that the defendant Cox or his employés would infract the bond when in law if the said minor entered for any legal purpose and remained only so long as was reasonably required by his mission in so entering there would be no infraction of the bond. And because from said charge the jury were probably led to believe that if the minor entered for any purpose other than to purchase intoxicating liquor the law would not excuse the entering and remaining. And because said charge and said paragraph therefore does not fairly present in an affirmative way the defense set up by said defendants.

4th. The Court erred in that part of the Court's charge wherein the jury were referred to paragraph four of plaintiff's petition in the event they should find for the plaintiff and assess the damage for each sale as set out in said paragraph of plaintiff's petition. Because it was the duty of the Court to charge the law applicable to this case without referring specifically to said paragraph or any other particular paragraph of plaintiff's petition said reference to said paragraph was calculated to lead the jury to believe that
46 plaintiff's cause of action as set out in the said paragraph four was supported in the opinion of the Court by the evidence.

5th. The court erred in giving to the jury the following charge "if you find for the plaintiff you will state in your verdict the number of infractions of the bond in evidence before you, that you may find, and assess plaintiff's damage at five hundred dollars for each infraction, and you will also state what infractions, if any, you find that is, if for entering and remaining, so state, or if for a sale or sales so state, or if for each so state giving the number in each instance, if any, of each infraction." Because said charge prescribes a form to find in favor of plaintiff but gives to the jury no form should they find for the defendants and thereby the jury were probably led to believe that the Court thought they should find for the plaintiff. And because said form is incomplete, misleading and in view of the evidence highly prejudicial to the defendants.

6th. The Court erred in refusing to give special instruction No. 1, asked by the defendant and in adding thereto the following clause "Unless you should believe from the evidence that after procuring the whiskey or beer (if he did so) he then loitered or remained in defendant Cox's saloon or place of business with the knowledge and consent of the said Cox, his agents or employés, for a longer time than was reasonably necessary to procure said whiskey or beer." Because said special instruction as requested by the defendants should have been either refused or given without limitation or qualification; and because said special charge as presented by the defendants was the law applicabl to the case.

7th. The Court erred in that part of his charge wherein the jury are instructed "But you are further instructed in this connection, if you believe and find from the evidence that the said W. W. Thompson after entering the said saloon of the defendant P. O. Cox (if he did so) loitered or remained in said saloon with the knowledge and consent of the said Cox his agents or employés for a longer time than was reasonably necessary, under the facts in this case, for him to purchase drink and pay for the liquor for which he entered and etc."

47 Because said charge does not define nor attempt to define the word remain nor does it give the synonyms of said word, but merely repeats said word.

8th. Said charge as a whole is unfair and prejudicial to the defendants because it repeats the penalty that the jury might find against the defendants and because the defense is not clearly stated in any part of said charge.

9th. The verdict of the jury herein is unsupported by the evidence in so far as it finds three infractions of the bond for sales made to the minor because the said minor testified in substance that he stated to the bar tender before purchasing intoxicants of any kind that he was above the age of twenty one years, and the bar tender, John May, states that after said statement was made by the alleged minor he believed that said minor was above the age of twenty one years and so believing sold him whiskey and beer, wherefore defendants say that said verdict in so far as it finds for alleged sales is the result of passion or prejudice on the part of the jury and ought not to be permitted to stand.

Wherefore the defendants pray that said verdict and the judgment thereon rendered be set aside and held for naught and that they be granted a new trial.

DEWEY LANGFORD,
Atorney for Defendants

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Defendant's 1st. Amended Original Motion for New Trial. Filed Mch. 25th, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

In District Court of Hamilton County, Texas, February Term, 1904.

Order Overruling Motion for New Trial. Notice of Appeal and 20 Day Order, etc.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

On this the 25th day of March, 1904, came on to be heard and considered the motion of defendants to set aside the verdict and judgment in this case rendered on, to wit, the 22nd day of March,

48 1904, and after hearing the reading of said motion and being advised of the law the same was in all things overruled and

denied by the Court, to which action and ruling of the Court the defendants excepted and in open Court gave notice of appeal to the Court of Civil Appeals for the 3rd Supreme Judicial District of Texas at Austin.

And it is ordered by the Court that the parties herein be granted twenty days after the conclusion of the term to prepare and file Statement of Facts and Bills of Exception.

Supersedeas Bond, Filed Apr. 13, 1904.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

In the District Court of Hamilton County, Texas.

Whereas in the above styled and numbered cause, pending in the District Court of Hamilton County, Texas, and at a regular term of said Court, to wit, on the 22nd day of March 1904, the said W. B. Thompson recovered judgment against the said P. O. Cox, Sam Levy and W. M. Evans for the sum of three thousand dollars with interest thereon from the 22nd day of March 1904, at the rate of six per cent. per annum, and all cost of suit (and whereas on the 25th day of March 1904, a motion theretofore filed by the said defendants P. O. Cox, Sam Levy and W. M. Evans praying for a new trial was overruled, to which action of the court the said defendants; P. O. Cox, Sam Levy and W. M. Evans then and there excepted and gave notice of appeal to the Court of Civil Appeals of the Third Supreme Judicial District of Texas, at Austin) from which judgment and order the said P. O. Cox, Sam Levy & W. M. Evans have taken an appeal to the Court of Civil Appeals for the Third Supreme Judicial —, at Austin, Texas.

Now, therefore we P. O. Cox, Sam Levy & W. M. Evans as principals and C. J. Swasey and W. J. Hefley as sureties, acknowledge ourselves bound to pay said W. B. Thompson the sum of six thousand and five hundred dollars.

Conditioned that the said P. O. Cox, Sam Levy & W. M. Evans appellants shall prosecute their appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Ap
49 peals shall be against them, they shall perform its judgment, sentence or decree, and pay all such damages as said Court many award *award* against them.

Witness our hands this 12th day of April, A. D. 1904.

P. O. COX.
SAM LEVY.
W. M. EVANS.
C. J. SWASEY.
W. J. HEFLEY.

STATE OF TEXAS, *County of Tarrant:*

I, Jno. A. Martin, Clerk of the District Court, in and for Tarrant County, do hereby certify that the sureties on the within bond, are in my opinion, good and ample security for amount therein specified, and that I would accept and approve same if presented to me.

Given under my hand and seal of office at Fort Worth, Texas, this 11th day of April, 1904.

[SEAL.]

JNO. A. MARTIN,
Clerk District Court, Tarrant County, Texas.

Approved this the 13th day of April, 1904.

R. C. CORNELIUS,
Dist. Clerk, Hamilton Co., Texas.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Supersedeas Bond. Filed April 13th, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

Assignment of Error. Filed June 15th, 1905.

In the District Court of Hamilton County, Texas.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Now come the defendants and assign the following errors in the above styled cause.

1. The court erred in its charge to the jury in permitting and directing a recovery in favor of plaintiff on any phase of the case on a finding by the jury on a preponderance of the evidence, in that the recovery herein being a penalty and the action being one highly penal in its nature, it becomes and was necessary for the jury in order to find for the plaintiff on any phase of the case presented to find the facts warranting such finding to exist from the evidence beyond a reasonable doubt.

2. The court erred in the third paragraph of its charge and in the fourth paragraph in so far as it is in connection with the third in directing a verdict for plaintiff if the jury should find and believe from the preponderance of the evidence that the facts in said third and fourth paragraphs set out existed in so far as it submitted to the jury the issue as to whether or not P. O. Cox was on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico, Hamilton County, Texas, in that there is absolutely no scintilla of evidence warranting the submission of such issue, there being no proof of any kind, character or description by inference or otherwise in the evidence that any license was ever issued by any person to the said P. O. Cox or that he was a licensed retail dealer.

3. The verdict of the jury is contrary to the law and without evidence to support it, in that there is absolutely no evidence or scintilla thereof that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico, Hamilton County, Texas, it appearing that no license was introduced in evidence and that no proof of any kind was made to supply the failure to introduce the license.

4. The Court erred in directing a verdict for the plaintiff in any event under the evidence, for that there is no evidence or scintilla thereof going to show that P. O. Cox was ever a licensed retail liquor daler in the city of Hico.

5. The court erred in the third paragraph of its charge and in the fourth paragraph in so far as it — in connection with the third in directing a verdict for the plaintiff if the jury should find and believe from a preponderance of the evidence that the facts in said third and fourth paragraphs set out existed in so far as it submitted to the jury the issue as to whether or not P. O. Cox was on or about the 30th day of May, 1902, a licensed retail liquor dealer in
51 Hico, Hamilton County, Texas, in that it appears from the pleadings, the only place in which a license is mentioned, that a license was issued to P. O. Cox & Co., a retail liquor dealer in Hico, Hamilton County, Texas, and while the pleadings allege that P. O. Cox was doing business under the name of P. O. Cox & Co. yet there is no scintilla of evidence to show or indicate that P. O. Cox was doing business under the name of P. O. Cox & Co.

6. The verdict of the jury is contrary to the law and the evidence, in that there is absolutely no evidence to show that P. O. Cox was doing business in the name of P. O. Cox & Co., there being no evidence or scintilla thereof upon the subject in the record and every inference in the record that can be drawn upon the subject goes to show that P. O. Cox & Co. was a firm composed of at least two persons.

7. The Court erred in its charge to the jury in assuming that P. O. Cox was doing business under the name of P. O. Cox & Co., for that there is absolutely no evidence in the record warranting the said assumption.

8. The court erred in submitting to the jury in its charge continually and with reiteration the issue as to the entry of the said Thompson into the said saloon with or without the consent of some person authorized to give consent, for that the Court had erroneously permitted the father of the said Thompson to testify that he did not give his consent to the said entry and the continual reiteration of the said issue had a tendency to direct the jury's mind unduly to the testimony of the father and had a tendency to cause them to give undue weight to the fact that the entry was made without the consent of the father and had a tendency to cause them to find for the plaintiff upon the issue of the entry and remaining to the injury of the defendant, and said issue which was immaterial and irrelevant was given prominence in the case and there being no dispute as to the facts of the said issue it in its nature must have injuriously affected the case of defendant before the jury.

9th. The Court erred in its charge to the jury wherein the jury is instructed as to the form of their verdict if they found for plaintiff,

in that the charge does not inform the jury as to the form of
2 their verdict if they found for defendants, thereby probably leading the jury to infer or believe that the Court thought that
n no contingency could they find for the defendants.

10. The Court erred in its charge in that the same is contradictory nd confusing and in the nature thereof undoubtedly affected inuriously the case of the defendants, in that in the third paragraph of ts charge it instructs the jury directly to find for the plaintiff on the ssue of entry and remaining if they believed from the preponderance of the evidence that the defendant Cox or his agents knowlingly ermitted W. W. Thompson to enter and remain in his house or aloon wherein he was conducting the business of a retail liquor ealer, if the said Thompson was then and there under the age of wenty one years, this paragraph being short, concise and complete within itself and without qualification. And in the fourth paragraph f the Court's charge which is quite lengthy the Court undertakes in ome measure to avoid the effect of the third paragraph by charging he jury amongst other things that if the jury believes from the evidence that the said Thompson entered the said saloon for the purpose f procuring intoxicating liquors and that the same were sold to him nd that the persons selling the same did so in good faith believing im to be twenty-one years of age and having good grounds for uch belief and that the said Thompson did not remain in said aloon for a longer time than was necessary under the circumstances o procure said liquor, that is to purchase drink and pay for same, hat they should find for the defendant but in the same paragraph f the same charge the converse of the proposition is given, making he fourth paragraph of the charge a complete charge in itself upon ll phases of the entry and remaining that could be submitted in his case and making it a complete exposition of the law of the same nless another assignment of error that we make herein should be ell taken, and said fourth paragraph uses no words purporting to ualify the third paragraph. The effect of the two charges is such hat an absolute and positive irreconcilable conflict exists. The third paragraph directs a recovery absolutely without reference to any excuse and the fourth paragraph directs a recovery conditio53 ally and deals with all phases of the situation.

11. The court erred in the sixth paragraph of its charge, in that it charged that if the plaintiff did not consent to such sale to his son they should find for the plaintiff, and immediately afterwards charged that if they believed the sale was made in good faith to find for the defendants in that same taken as a whole is contradictory and would mislead and confuse the jury.

12. The court erred in permitting or directing a verdict in favor of the plaintiff herein in any event under the evidence, for that the evidence shows that the application made by P. O. Cox was for a license to do business at two separate and distinct places and the allegation that license was issued to do business at the place in the application mentioned shows that the license was void upon its face even though the Court should hold that it was necessary to introduce the license in evidence or make proof that the license was issued.

13. The court erred in its charge in directing a recovery in favor

of plaintiff in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that under the charge in such case the entry must have been lawful and the recovery is permitted solely for unlawful remaining without an unlawful entry.

14. The Court erred in its charge in directing a recovery in favor of plaintiff in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that it not being unlawful for a minor to enter and remain in a saloon for a length of time sufficient to purchase a drink and pay for same if the saloon keeper sells the same in the belief that the minor is twenty one years of age and has good grounds for such belief, it must result that the legislature contemplated that entry and remaining under such circumstances were not violations of the bond and that no recovery could be had for a remaining after entry under such circumstances.

15. The court erred in that it rendered judgment against the defendants on said bond, for that the law requiring the giving of the same is unconstitutional being violative of Section 1 of Article 14 of the United States Constitution in that it is class legislation
54 and also of Article 3 of the bill of rights of the State of Texas.

16. The court erred in that it rendered judgment upon said bond against the defendants for that same is violative of Section 8 of Article 1 of the Constitution of the United States, same being in restraint of interstate commerce.

17. The court erred in that it submitted any issue of liability upon the bondsmen and the sureties in this case, for that the bond sued on is a satisfactory bond and is more onerous than same could be legally made and is more onerous than is required by law in that same is a joint and several obligation and binds the maker and sureties thereon jointly and severally and their heirs, executors and administrators for the payment of same, whereas said bond being a penal bond all liability upon same if in conformity with the statute would cease upon the death of the maker thereof and could only be a joint bond and not a joint and several bond.

18. The Court erred in that it did not sustain a general demurrer to plaintiff's petition in that the law requiring a bond and imposing penalties on retail liquor dealers requires them to give a bond for the pursuit of their business, but does not require a bond of any other merchant and is therefore violative of the bill of rights of the State of Texas, the sale of intoxicants being legalized in this State.

19. The Court erred in that it overruled defendant's general demurrer to the petition and submitted any question to the jury as to recovering a penalty for no penalty could be recovered or imposed in the State of Texas unless for an offense defined by the written laws of said State and for which a penalty is affixed by law and there is no statute in this State defining it as an offense for a minor to enter and remain in a saloon and it not being so defined as an offense no penalty can be imposed therefor by requiring the giving of a bond.

20. The Court erred in that it rendered judgment upon said bond, for that said bond is void in that same embraces among its conditions the giving of intoxicating liquors as well as making it a penalty

to permit a minor to enter and remain in such place of business of P. O. Cox, whereas the caption of the act does not embrace nor purport to regulate the giving to minors or the entering and remaining of minors in saloons and is violative of Section 35 Article 3 of the Constitution of the State of Texas in that it does not express in the caption the purpose of the act and thereby makes the bond more onerous than the legislature under said act had authority to require of a retail liquor dealer.

ORRICK & TERRELL AND
DEWEY LANGFORD,
Att'y- for Def'ts P. O. Cox, Sam Levy & W. M. Evans.

No. 1335. W. B. Thompson *vs.* P. O. Cox *et al.* Assignments of error. Filed June 15th, 1904. R. C. Cornelius, Dist. Clerk Hamilton Co. Texas.

Bill of Costs.

No. 1335.

W. B. THOMPSON
vs.
P. O. COX ET AL.

Plaintiff and Defendant, to Officers of Court, Dr. to costs accrued in the above entitled and numbered cause.

Clerk's Fees.

1902.			
June 9.....	Filing Suit		.15
" ".....	Docketing Cause		.20
" ".....	1 Citation & 2 Copies to Tarrant County...		1.75
" ".....	1 Citation to Hamilton Co.....		1.25
" ".....	2 Copies of Petition.....		8.10
Aug. 11.....	Sub. for 1 Witness.....		.25
" 23.....	" " 5 "		.85
" 25.....	Filing Answer		.15
" 27.....	Sub. 1 Witness		.25
Sept. 8.....	" 1 "		.25
" 15.....	" 1 "		.25
" 18.....	3 Witness Certificates.....		1.50
" 17.....	Filing First Supt. Petition.....		.15
" 17.....	" Motion to Cont.....		.15
" 16.....	" " for Cost Bond.....		.15
" 17.....	" 1st. Amd. Orig. Ans.....		.15
" 18.....	" Special Charge		.15
" 18.....	" 2 Special Charges.....		.30
" ".....	" Charge of the Court.....		.15
" 17.....	" 3 Papers		.45
" ".....	Swearing 5 Witness.....		.50
" ".....	" 6 "		.60
" 18.....	Final Judgment		1.00
" 19.....	Judgment Overruling Motion for New Trial.		.75
			19.45

57 Amt. Brat. Ford..... 19.45

1902.

Sept.	16.....	Docketing 1 Motion.....	
"	"	Entering 1 Order	.20
"	"	Docketing 1 Motion.....	.75
Oct.	8.....	Approving Bond	.20
Dec.	1.....	Filing Assignment of Errors.....	1.50
Sept.	28.....	" Statement of Facts.....	.15
"	.....	Entering Appearance	.15
"	.....	Taxing Cost & 1 Copy.....	.30
Oct.	8.....	Filing Appeal Bond	.25
Sept.	19.....	Filing 10 Papers.....	.15
"	19.....	" Motion for New Trial.....	1.50
Dec.	15.....	Transcript of Record.....	.15

1903

Aug.	Term...	1 Cont.	30.10
Feb.	" ...	1 "	.20

1904.

Feb.	24.....	Filing Intgs. to P. O. Cox.....	.20
"	24.....	Cert Copy Intgs. to P. O. Cox.....	.15
"	"	Precept to Serve & Copy.....	1.25
"	26.....	Filing Cross Intgs.....	1.25
"	26.....	Cert. Copy Intgs. to P. O. Cox, D. & X.....	.15
"	26.....	Commission to take Dep. of P. O. Cox.....	4.65
Mch.	3.....	Filing Defts. 2" Amd. Ans.....	.75
"	21.....	" Plffs. 2" Supt. Petition.....	.15
"	21.....	" Motion to Cont.	.15
"	21.....	" 3 Papers	.15
"	21.....	Docketing 1 Motion.....	.45
"	23.....	Filing Motion for New Trial.....	.20
"	25.....	" 1st Amd. Motion for New Trial.....	.15
"	22.....	" 2 Special Chgs.....	.15
"	22.....	" Chg. of Court.....	.30
"	21.....	Swearing 5 Witnessess.....	.15
			.50

58 Amt. Ford. $65.80

Amt. Brot. Ford..... $65.80

1904.

Mch.	—.....	Final Judgment	
"	.....	Judgment Overruling Motion for New Trial.	1.00
"	22.....	4 Witness Certificates.....	.75
"	21.....	Swearing 3 Witnesses.....	2.00
"	21.....	1 Affidavit	.30
Apr.	12.....	Filing State of Facts.....	.50
"	13.....	" and Approving Bond.....	.15
June	15.....	Filing Assignment of Errors.....	1.65
"	17.....	Transcript of Record.....	.15
			36.50

$108.80

Sheriff's Fees.

Serving 2 Citations & Mileage	$1.70
" 1 " "	2.95
" Sub. & Mileage	2.70
" " 5 Wit. & "	2.50
" " 1 " " "	2.70
" " 1	.50
" " 1 " " "	.50
Serving Precept	.75
Jury Fee	.50
Total Sheriff's Fees	$14.80

Witness Fees.

J. T. Adams	$5.64
J. E. Welch	5.64
W. W. Thompson	12.72
J. T. Adams	4.64
J. E. Welch	4.64
Amt. Ford	$33.28
59 Amt. Brot. Ford	33.28
J. A. Gamble	3.64
J. T. Newsome	3.64
	$40.56

"Stenographer's Fee $3.00."

Recapitulation

Clerk's Fees	$108.80
Sheriff's "	14.80
Witness "	40.56
Stenographer's Fee	3.00
Total	$167.16
By Cash By Plff	39.08
Balance	128.00
By Cash By Deft	30.10
Balance	$97.98

Clerk's Certificate to Transcript.

HE STATE OF TEXAS, *County of Hamilton*:

I, R.C.Cornelius, Clerk of the District Court in and for the County Hamilton, do hereby certify that the foregoing 61 pages con- in a true and correct transcript of the record of all the proceedings d in this cause as the same appears of record and now on file in y office.

To certify which witness my hand and seal of this Court this the 17th day of June, A. D. 1904.

[SEAL.] R. C. CORNELIUS,
Clerk of the District Court of Hamilton Co., Texas.

(Endorsed:) No. 3394 P. O. Cox *et al.*, Appellants, *vs.* W. B. Thompson, Appellee, From the District Court of Hamilton County. Applied for by D. Langford Attorney for appellants on the 13 day of April 1904, and delivered to D. Langford on the 17th day of June 1904. R. C. Cornelius, Clerk District Court Hamilton County. Filed in Court of Civil Appeals, at Austin Texas, the 8th day of July 1904. R. H. Connerly, Clerk. Court of Civil Appeals 3rd Supreme Judicial District of Texas.

60 *Opinion of Court of Civil Appeals.*

Opinion.

P. O. COX ET AL., Appellants,
vs.
W. B. THOMPSON, Appellee.

Appeal from the District Court of Hamilton County.

Opinion.

This is a suit for the recovery of statutory penalties for breach of a liquor dealer's bond. P. O. Cox is the principal in the bond and the other defendants are sureties. The petition charges that the defendant Cox breached the bond by permitting W. W. Thompson, a minor, to enter and remain in his saloon on three separate occasions. The jury found these allegations true, and returned a verdict for the plaintiff for $3,000. Judgment was entered accordingly and the defendants have appealed. These findings are amply supported by testimony and are not challenged in this court.

The first assignment of error complains of the action of the court authorizing a verdict for the plaintiff upon a preponderance of testomíny the contention being that as this is a penalty suit, the plaintiff rested under the duty of establishing his case beyond a reasonable doubt. It has been repeatedly held in this state that in all civil cases the jury should decide according to the preponderance of the evidence. (Sparks *vs.* Dawson, 47 Tex., 145; Hillingmon *vs.* Rose, 81 Tex., 222; Waters Pierce Oil Co. *vs.* State, 19 Crt. Civ. App. 1.) It seems to us that the rule referred to is particularly applicable in this case, which is an action founded upon the breach of a written contract. The fact that the damages recoverable are fixed in amount by a statutory enactment, and are in fact a penalty, does not change the fact that the suit is based upon a written contract; and, such being the case, we see no reason why the plaintiff should be required to prove a breach of the contract by any higher degree of testimony

n is required in any other suit founded upon a breach of contract.

The third, fourth and sixth assignments assail the verdict upon the theory that there was no proof that P. O. Cox was icensed retail liquor dealer, as alleged by the plaintiff. That obtion was not urged against the verdict in the court below, and for t reason, it cannot be urged here.

Several objections are urged against the charge of the court, none which is regarded as tenable. The charge was quite full, and subtted the case to the jury in as favorable a manner to the defendants they were entitled to have it submitted.

The point is made that P. O. Cox'- application for license to do siness designated two places. The application described the place business as "at No. — J. A. Gamble Building, in the town of Hico, unty of Hamilton, and part of lots No. 11 and 12 in block No. 3, ision one." It does not seem to us that this description necesily embraces two separate places of business. The Gamble buildg may have been located on parts of lots No. 11 and 12, in block . 3, division one. But if appellant's contention is correct, and the scription does include two separate places, it does not follow that e plaintiff was not entitled to recover. In Greene *vs.* Southard, 94 x., 470, it was held that the bond of a liquor dealer is not invalid, d will support a recovery by one aggrieved by its infraction though e license and the application therefor contain no designation of the rticular house in which the business was to be conducted.

Numerous objections are urged against the validity of the statute quiring retail liquor dealers to give bond in the manner prescribed the statute. These have all been considered and are overruled. The st serious of these objections is the one which urges that the statute erred to is obnoxious to the 14th amendment to the Federal Contution, as construed in Connolly *vs.* Union Sewer Pipe Co., 13 p. Crt. Rep. 431. However, since this case was submitted, our preme Court has decided that identical question against the conion of appellants (Douthit *vs.* State, decided Dec. 15, 1904.)

There are some other questions presented in appellants' brief, all of which have received due consideration, and are decided against appellants.

No reversible error has been shown and the judgment is irmed.

W. M. KEY,
Associate Justice.

1-11-05.

(Endorsed:) No. 3394 P. O. Cox *et al.*, Appellants, *vs.* W. B. ompson, Appellee. Appeal from Hamilton County. Opinion. Afmed. W. M. Key, Associate Justice. With App. No. 4586. Filed Court of Civil Appeals 3rd Supreme Judicial District, Austin, xas. Jan. 11, 1905. R. H. Connerly, Clerk. Filed in Supreme urt Mar. 18, 1905. F. T. Connerly Clerk.

Judgment of Court of Civil Appeals.

Judgment of the Court of Civil Appeals.

Rendered January 11th, 1905.

No. 3394.

P. O. COX ET AL.
vs.
W. B. THOMPSON.

Appeal from District Court of Hamilton County.

Opinion by Associate Justice Key.

This cause came on to be heard on the transcript of the record, and the same being inspected because it is the opinion of the court that there was no error in the judgment: It is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee, W. B. Thompson, do have and recover of and from the appellants, P. O. Cox, Sam Levy and W. M. Evans, principals, and their sureties C. J. Swasey and W. J. Hefley, the amount adjudged by the court below and all costs in this behalf expended and this decision be certified below for observance.

63 *Motion for Rehearing.*

In the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin.

P. O. COX ET AL., Appellants,
vs.
W. B. THOMPSON, Appellee.

Now come the appellants herein and move the court to grant them a rehearing herein, and respectfully state to the court that as grounds for rehearing these appellants assign the following to-wit:

1. The Court erred in holding that the Fifteenth Assignment of Error was not well taken and in holding that the Court below did not err in rendering judgment against the defendants, the appellants herein, on the bond sued on, for that the law requiring the giving of the same is unconstitutional being violative of Section 1, Article 14 of the United States Constitution in that it is class legislation, and also violative of Article 3 of the Bill of Rights of the State of Texas.

2. The court erred in holding that the First Assignment of Error was not well taken and in holding that the Court below did not err in its charge to the jury in permitting and directing a recovery in favor of plaintiff, appellee herein, on any phase of the case on a finding by the jury on a preponderance of the evidence, in that the

recovery herein being a penalty and the action being one highly penal in its nature, it becomes and was necessary for the jury, in order to find for the plaintiff on any phase of the case presented, to find the facts warranting such finding to exist from the evidence beyond a reasonable doubt.

3. The court erred in holding that the Thirteenth Assignment of Error was not well taken and in holding that the court below did not err in its charge in directing a recovery in favor of plain-
64 tiff, appellee herein, in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that under the charge in such case the entering must have been lawful and the recovery is permitted solely for unlawful remaining without unlawful entry.

4. The court erred in holding that the Nineteenth Assignment of Error was not well taken, in that it held that the court below did not err in overruling defendant's general demurrer to the petition and submitted any question to the jury as to recovering a penalty, for no penalty could be recovered or imposed in the State of Texas unless for an offense defined by the written laws of said state and for which a penalty is affixed by law, and there is no statute in this state defining it as an offense for a minor to enter and remain in a saloon, and it not being so defined as an offense, no penalty can be imposed therefor by requiring the giving of a bond.

5. The court erred in holding that the Twentieth Assignment of Error was not well taken, in that it held that the court below did not err in rendering judgment upon said bond, for that said bond is void in that same embraces among its conditions the giving of intoxicating liquors, as well as making it a penalty to permit a minor to enter and remain in such place of business of P. O. Cox, whereas the caption of the act does not embrace nor purport to regulate the giving to minors or the entering and remaining of minors in saloons, and is violative of Section 35, Article 3, of the constitution of the State of Texas, in that it does not express in the caption the purpose of the act and thereby makes the bond more onerous than the legislature, under said act, had authority to require of a retail liquor dealer.

6. The court erred in holding that the Fourteenth Assignment of Error was not well taken in that it held that the court below did not err in its charge in directing a recovery in favor of plaintiff, appellee herein, in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that it not being unlawful for the minor to enter and remain in the saloon for a length of
65 time sufficient to purchase a drink and pay for the same if the saloon keeper sells the same in the belief that the minor is twenty one years of age and has good grounds for such belief, it must result that the legislature contemplated that the entry and remaining — such circumstances were not violations of the bond and that no recovery could be had for the remaining after entry under such circumstances.

7. The court erred in holding that the Second Assignment of Error was not well taken, in that it held that the court below did not err in the third paragraph of its charge and in the fourth paragraph in so far as it is in connection with the third, in directing a verdict for plaintiff if the jury should find and believe from a preponderance of the evidence that the facts in said third and fourth paragraphs set out existed, in so far as it submitted to the jury the issue as to whether or not P. O. Cox was, on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico, Hamilton County, Texas, in that there is absolutely no scintilla of evidence warranting the submission of such issue, there being no proof of any kind, character or description, by inference or otherwise, in the evidence that any license was ever issued by any person to the said P. O. Cox or that he was a licensed retail dealer.

8. The court erred in holding that the Third Assignment of Error was not well taken in that it held that the verdict of the jury was not contrary to the law and without evidence to support it, in that there is absolutely no evidence or scintilla thereof that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico, Hamilton County, Texas, it appearing that no license was introduced in evidence and that no proof of any kind was made to supply the failure to introduce the license.

9. The court erred in holding that the Fourth Assignment of Error was not well taken in that it held that the court below did not err in directing a verdict for the plaintiff in any event under the evidence, for that there is no evidence or scintilla thereof going to show that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico.

66 10. The court erred in holding that the Twelfth Assignment of Error was not well taken in that it held that the Court below did not err in permitting or directing a verdict in favor of the plaintiff herein in any event under the evidence, for that the evidence shows that the application made by P. O. Cox was for a license to do business at two separate and distinct places, and the allegation that license was issued to do business at the place in the application mentioned shows that the license was void upon its face even though the court should hold that it was not necessary to introduce the license in evidence or make proof that the license was issued.

11. The court erred in holding that the Fifth Assignment of Error was not well taken in that it held that the Court below did not err in the third paragraph of its charge, and in the fourth paragraph in so far as it is in connection with the third, in directing a verdict for plaintiff if the jury should find and believe from the preponderance of the evidence that the facts in said third and fourth paragraphs set out existed in so far as it submitted to the jury the issue as to whether or not P. O. Cox was, on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico Hamilton County, Texas, in that it appears from the pleadings, the only place in which a license is mentioned, that a license was issued to P. O. Cox & Co., retail liquor dealers in Hico, Hamilton County, Texas, and while the pleadings allege that P. O. Cox was doing business under the name of P. O. Cox & Co., yet there is no scintilla of evidence to show or indicate

that P. O. Cox was doing business under the name of P. O. Cox & Co., and in holding in substance that the question raised by this assignment could not be raised on appeal because not sufficiently made in the court below.

12. The court erred in holding that the Sixth Assignment of Error was not well taken in that it held in substance that the verdict of the jury was not contrary to the law and the evidence, in that there is absolutely no evidence to show that P. O. Cox was doing business in the name of P. O. Cox & Co., there being no evidence or scintilla thereof upon the subject in the record and every inference in
67 the record that can be drawn upon the subject goes to show that P. O. Cox & Co. was a firm composed of at least two persons, and in holding in substance that the question presented by this assignment could not be raised on appeal because not sufficiently raised in the court below.

13. The Court erred in holding that the Seventh Assignment of Error was not well taken in that it held that the court below did not err in its charge to the jury in assuming that P. O. Cox was doing business under the name of P. O. Cox & Co., for that there is absolutely no evidence in the record warranting the said assumption, and in that it held in substance that the question presented by this assignment could not be raised on appeal because not sufficiently raised in the court below.

14. The court erred in holding that the Seventeenth Assignment of Error was not well taken in that it held that the court below did not err in that it submitted any issue of liability upon the bondsmen and the sureties in this case, for that the bond sued on is a satisfactory bond and is more onerous than same could be legally made, and is more onerous than is required by law, in that same is a joint and several obligation, and binds the maker and sureties thereon, jointly and severally, and their heirs, executors and administrators for the payment of same, whereas said bond being a penal bond all liability upon same if in conformity with the statute would cease upon the death of the maker thereof, and could only be a joint bond and not a joint and several bond.

15. The court erred in holding that the Eighth Assignment of Error was not well taken in that it held that the court below did not err in submitting to the jury, in its charge, continually and with reiteration the issue as to the entry of the said Thompson into the said saloon, with or without the consent of some person authorized to give consent, for that the court had erroneously permitted the father of the said Thompson to testify that he did not give his consent to the said entry, and the continual reiteration of the said issue had a tendency to direct the jury's mind unduly to the testimony of the father, and had a tendency to cause it to give undue weight
68 to the fact that the entry was made without the consent of the father, and had a tendency to cause it to find for the plaintiff upon the issue of the entry and remaining, to the injury of the defendant, and said issue, which was immaterial and irrelevant, was given undue prominence in the case, and there being no dispute as to the facts of the said issue, it, in its nature, must have injuriously affected the case of defendants before the jury.

16. The court erred in holding that the Ninth Assignment of Error was not well taken in that it held that the court below did not err in its charge to the jury wherein the jury is instructed as to the form of its verdict if it found for plaintiff, in that the charge does not inform the jury as to the form of its verdict if it found for defendants, thereby probably leading the jury to infer or believe that the court thought that in no contingency could it find for the defendants.

17. The court erred in holding that the Tenth Assignment of Error was not well taken in that it held that the court below did not err in its charge in that the same is contradictory and confusing, and in the nature thereof undoubtedly affected injuriously the case of the defendants, in that in the fourth paragraph of its charge it instructs the jury directly to find for the plaintiff on the issue of entry and remaining, if they believed from the preponderance of the evidence that the defendant, Cox, or his agents, permitted W. W. Thompson to enter and remain in his house or saloon, wherein he was conducting the business of a retail liquor dealer, if the said Thompson was then and there under the age of twenty-one years, this paragraph being short, concise and complete within itself and without qualification. And in the fifth paragraph of the court's charge, which is quite lengthy, the court undertakes, in some measure, to avoid the effect of the fourth paragraph by charging the jury, amongst other things, that if the jury believes from the evidence that the said Thompson entered the said saloon for the purpose of procuring intoxicating liquors, and that the same were sold to him, and that the persons selling the same did so in good faith, believing him to be twenty-one years of age and having good grounds for such belief, and that said Thompson did not remain in said saloon for a longer time than was necessary, under the circumstances, to procure
69 said liquor, that is, to purchase, drink and pay for same, that it should find for the defendant, but in the same paragraph of the same charge the converse of the proposition is given, making the fifth paragraph of the charge a complete charge in itself upon all phases of the entry and remaining that could be submitted in this case, and making it a complete exposition of the law of the same unless another assignment of error that we make herein should be well taken, and said fifth paragraph uses no words purporting to qualify the fourth paragraph. The effect of the two charges is such that an absolute and positive irreconcilable conflict exists. The third paragraph directs a recovery absolutely without reference to any excuse, and the fourth paragraph directs a recovery conditionally, and deals with all phases of the situation.

18. The court erred in holding that the Eleventh Assignment of Error was not well taken in that it held that the court below did not err in the sixth paragraph of its charge, in that it charged that if the plaintiff did not consent to such sale to his son they should find for the plaintiff, and immediately afterwards charged that if they believed the sale was made in good faith to find for the defendants, in that same, taken as a whole, is contradictory and would mislead and confuse the jury.

Wherefore for the manifest errors in the judgment of this Honorable Court, the appellants respectfully pray that a rehearing be granted.

And appellants would respectfully state to the court that the attorneys for the appellee herein are Main & Chesley whose post office address is Hamilton in Hamilton County, Texas, and they pray that notice of this motion be duly served on them as required by law, and that on hearing that a rehearing be granted herein as herein prayed by appellants.

DEWEY LANGFORD,
ORRICK & TERRELL,
Attorneys for Appellants.

(Endorsed:) *Mo.* 2104. P. O. Cox *et als. vs.* W. B. Thompson. Appellants' Motion for Rehearing. Overruled. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Jan. 23, 1905. R. H. Connerly, Clerk. Filed in Supreme Court Mar.
70 18, 1905. F. T. Connerly, Clerk. With App. No. 4586.

Order Overruling Motion for Rehearing.

Made February 22nd, 1905.

Motion 2104: No. 3394: P. O. Cox *et al. vs.* W. B. Thompson: Appeal from Hamilton County; Motion for a Rehearing; The Motion is Overruled.

Application for Writ of Error.

In the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin.

P. O. COX ET AL., Appellants,
vs.
W. B. THOMPSON, Appellee.

To the Honorable Supreme Court of the State of Texas, sitting at Austin:

Now come the appellants herein and apply to the Honorable Supreme Court of the State of Texas for the issuance of its writ of error to the said Honorable Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas, for that said Honorable Court of Civil Appeals in affirming the above styled cause committed manifold errors, which errors were duly called to the attention of said court on motion for rehearing, which said motion was by said court duly overruled. And the appellants herein would respectfully
71 call to the attention of the Honorable Supreme Court and assign as error the action of said Honorable Court of Civil Appeals in the following particulars, to-wit:

1. The court erred in holding that the Fifteenth Assignment of Error was not well taken and in holding that the court below did not

err in rendering judgment against the defendants, the appellants herein, on the bond sued on, for that the law requiring the giving of the same is unconstitutional being violative of Section 1 Article 14 of the United States Constitution in that it is class legislation, and also violative of the Bill of Rights of the State of Texas.

In view of the very meager statement of the Court of Civil Appeals and the very short statement of facts that can be made to cover the whole case, we deem it proper for the convenience of the court to make the following short statement of the material facts in the case.

There was absolutely no evidence that P. O. Cox was doing business under the firm name of P. O. Cox & Co., direct, indirect or inferential.

There was absolutely no evidence that P. O. Cox or P. O. Cox & Co. ever obtained a license to retail liquors, either direct, indirect or inferential.

The application was put in evidence and will be refer-ed to under proper assignment.

The bond was introduced. It was the ordinary form of liquor bond, except the place of business is left blank, and was a joint and several obligation, binding the heirs, executors and administrators of the principal and sureties. The plaintiff's evidence showed that, as a matter of fact, Thompson was a minor, and that he did not consent for defendant to sell to his son or to permit his son to enter and remain in the saloon.

That at the time alleged said minor did enter and remain as many as three or more times, and bought drinks and got intoxicated.

The evidence would warrant the conclusion of the jury
72 that the minor loitered some minutes after taking his drinks.

The evidence of the defendants would have warranted a finding by the jury that the drinks were sold in good faith, and would have warranted a finding that his entering and remaining was for the purpose of getting drinks and that he did not loiter.

The evidence is voluminous but we think we have stated enough in our short summary for the court to grasp the case in the beginning, and hence omit all reference to detail and questions of credibility.

We think also that the charge of the court in so far as it is material to the questions involved should be set before the court, and in view of the fact that the said charge is set forth in full on page 4 *et seq.* of the brief, we think it will be much more convenient for the court to read it as there printed than to have it add to the volume of this motion.

We would call the court's attention to our argument upon this proposition on page 42 *et seq.* of our brief in this cause and page 7 of the supplemental brief filed herein, and we feel that in addition to these arguments we ought to make to the court the following additional suggestions by way of argument.

In making this argument we recognize that this court has held in the case of Douthit *vs.* State that the case attempted here to be made is governed by the case of the American Sugar Refining Co. *vs.* Louisiana reported in the 179 U. S. page 99, and that this case is analogous to that and that the case of Connolly *vs.* Union Sewer Pipe Co. reported in the 184 U. S. page 640 does not govern.

Why this is so this honorable court in its opinion did not under-
ake to show.

In view of the fact that we cannot bring ourselves to believe that
n a reconsideration of the question involved that this court will
nally hold the law to be as it did in the Douthit case, we feel con-
rained in this writ of error to make a few suggestions to the court,
oping that these suggestions in addition to the argument made in
ur briefs will present the point to the court in a new light.

In the first place we understand the law is that; by reason
3 of our constitution every man enjoys the right to pursue the
business of a retail liquor dealer as much so as the right to
ell dry goods, where local option has not been put in force in the
nanner authorized by the constitution.

If this were not so, yet nevertheless the Supreme Court of the
Inited States in two cases, to-wit Vance *vs.* W. A. Vandacook Co.,
70 U. S. page 438 and Scott *vs.* McDonald, 165 U. S. 58-107 holds
hat the liquor traffic comes within the domain of trade and com-
nerce and as such is entitled to the protection afforded by the con-
titution of the United States to trade and commerce.

With this preliminary statement, we would call the court's at-
ention to the fact that if a parallel can be drawn between the Sugar
Refining Co. case and this case it would seem that the parallel could
nly be drawn along the lines of the dissenting opinion of Mr.
Justice McKenna in the Connolly case, and he does not undertake to
oint out in any clear manner how the two cases can be parallel,
or does this court in any way whatever point out where the parallel
xists.

The consideration of the Sugar Refining Co. case shows that it was
n act to levy, collect and enforce payment of an annual license tax
n certain persons. That it had in view no other purpose than the
urpose of taxation expressed in its title.

The exemption in that act applied to planters and farmers grind-
ng and refining their own sugar and molasses and those who granu-
ated syrup for other planters during the rolling season. The opinion
n that case makes a distinction which can well be applied in this
ase and so nearly does it touch the identical question here raised,
hat we can truthfully say that were we now attacking our statute
egulating the sale of intoxicating liquors only in so far as its features
elating to taxation are concerned, that the exact question on which
he distinction was made in the Sugar Refining Co. case would exist
ere. The decision in that case says, "The act is not only exempting
lanters who use their sugar in the manufacture of articles of a
holly different description such as confectionery, preserves or pastry
or such as one which would exempt the farmer who devoted
74 his corn or rye to the making of whiskey, while other manu-
facturers of these articles were subject to the tax. A somewhat
ifferent question might arise in such case."

If in our attack upon the act involved in this cause we had no
ther point of distinction between this case and the Sugar Refining
Co. case, we think that a good point would be made, and that the very
oint having been suggested by the Supreme Court of the United

States itself in the very case would be entitled, if not absolutely good, at least to the most careful consideration and that the profession would be entitled to have the reasons why such point did not constitute a good distinction pointed out to it. We know that there is no rule of law requiring this court to give its reasons for any of its decisions, but we believe that long custom and practice by the Judges of this court has established something nearly akin to the rule for which we contend.

Whether the point suggested in the Sugar Refining Co. case is a good one or not, yet the vastness of the distinction between that case and this, in our humble opinion should be at once apparent to an appellate court, unless they follow the reasoning of Justice McKenna to the exclusion of the majority of the Supreme Court of the United States.

In the Sugar Refining Co. case it should be borne in mind that the basic principles upon which that case was decided are two. First, that it was purely a revenue act. Second, that from time out of mind it has been the policy of this government not only to classify for purposes of taxation, but to exempt producers from taxation of the methods employed by them to put their products upon the market.

It should also be borne in mind that that case itself goes on to point out that refined sugar is a national and ultimate product of the cane and the various steps dealt with in the act are merely taken to perfect such product and are but incident to its original growth.

The gist of that decision is contained entirely in the foregoing semi-quotation. Now wherein is it in any way analogous to this case?

75 Here we have an act which is entitled "An act to regulate the sale of spirituous, vinous or malt liquors or medicated bitters, to fix a tax upon all persons or association of persons selling such liquors, to define the time and manner of collecting such tax, to fix penalties for the violations of this act, etc." First, the main purpose of the act is obviously a regulation of the liquor traffic. Second the tax is imposed as an incident or step in the regulation.

In regulating the sale of liquors the most stringent provisions are made, including amongst other things the requiring of a bond such as the bond herein sued on, on which causes of action may arise to the extent of five thousand dollars on penalties, that is fines. This bond, it is useless for us to say, is most burdensome in its provisions and conditions as well as is also the act in many other particulars.

Now the question arises, is an act providing for the regulation of a business in anyway different from an act providing for the imposition of a license tax? It would certainly seem to us that if the answer is not at once plainly apparent, the answer of the Supreme Court of the United States in the Connolly case would forever settle this question.

The Illinois anti-trust act was an act more nearly on a parallel with this case than was the Sugar Refining Co. case, for it regulated and penalized the doing of certain business in certain ways and had an exemption clause almost in exact terms like the exemption clause in our statute, and the language of the Supreme Court of the United

tates in dealing with that anti-trust act is in all of its parts so applicable to the question here presented that we feel that we would do ur client an injustice did we not strongly urge upon this court a econsideration of its expressed idea on the subject in the Douthit ase.

There is in this case absolutely nothing which is similar to the ugar Refining Co. case except that fact that a license tax is in both imposed and that ommitting from our argument the taxation 6 feature as we have not undertaken to attack the statute as unconstitutional in so far as it imposed the tax, we think that he only point of similarity has been entirely eleminated and leaves he two cases, to-wit this case and the Sugar Refining Co. case, absoutely and utterly different cases in principle. If not, we have yet to ee any reason pointed out in any opinion of any court which even ith plausibility undertakes to show wherein the similarity exists.

It had occurred to us that the only two points upon which counsel ould base an argument to sustain the constitutionality of the statute nder consideration were, first, that the liquor traffic did not come ithin the domain of trade and commerce. Second, that the regulaions contained in the act are within the police powers of the state o such an extent that they would not be interferred with by the Federal Courts. Both of these points can be sustained by citation f abundant authorities, and we would approach a submission of his question to this court with great fear as to the ultimate result were it not that upon both questions the Supreme Court of the United States, which is our court of last resort, has spoken in no uncertain terms and in language that cannot be misunderstood.

The South Carolina cases hereinbefore cited absolutely dispose of he first question whatever may be the decision of other courts in the United States or other decisions of the Supreme Court of the United States. The South Carolina cases are the latest utterances on the subject and until overruled constitute the law of the land in so far s an interpretation of the United States Constitution is concerned with reference to what comes within the domain of trade and commerce. Second, the Connolly case deals with the question of police power so clearly that he who runs may read, and in the face of that ase it would unquestionably be far fetched to say that the exception herein complained of by reason of the police powers vested in the state did not bring the statute in conflict with the constitution of these United States.

It may be that we are obtuse in being unable to accept as 77 satisfactory to our minds the decision in the Douthit case, but we have not, and as no reasons were given by this court in that decision for its decision, we are unable to suggest to our minds any satisfactory reason which occurred to the court for holding that that case, to-wit the Douthit case, was governed by the principles decided in the Sugar Refining Co. case.

We submit that as this court in the Shippers Compress Co. case felt bound to follow the Supreme Court of the United States in so far as the imposition of penalties under the anti-trust act was concerned, we would suggest that however much this court may be of opinion that the Connolly case is wrong in principle, which is evidently its

opinion, yet they should accept it as the law of the land and from it as the law they should deduce their conclusions in dealing with cases of this class. We know that vagaries sometime arise where courts accept as law decisions which they believe not to be the law, as for instance our decisions holding that the superior title is in the vendor of land sold on credit, but nevertheless as there, it sometimes becomes necessary for courts to accept those decisions as law which they do not believe to be the law, and we think now that one of these occasions has arisen and that this court should accept the Connolly case as the law and apply the language used in that case to the points raised in this in an endeavor to keep as far as possible the decisions of our state from getting in such lamentable shape that no mind however great can reconcile them.

This is bound to be the result if in great questions like this we are compelled to accept the mere statement of the court that a proposition made comes within the principles decided in *decided in* a certain case, when to our mind it is a matter of utter impossibility to figure out how such a proposition comes within such a case.

We insist so earnestly upon this point because so thoroughly are we convinced that we are right that until the question has been passed upon by the very last court to which it can be taken under the law of the land, we shall not be satisfied and we deem it our duty to present to this court every argument that has occurred to us in
78 order that it may have the same lights before it as the Supreme Court of the United States which must and will ultimately be called upon to decide this question.

2. The court erred in holding that the First Assignment of Error was not well taken and in holding that the court below did not err in its charge to the jury in permitting and directing a recovery in favor of plaintiff, appellee herein, on any phase of the case on a finding by the jury on a preponderance of the evidence, in that the recovery herein being a penalty and the action being one highly penal in its nature, it becomes and was necessary for the jury, in order to find for the plaintiff on any phase of the case presented, to find the facts warranting such finding to exist from the evidence beyond a reasonable doubt.

In view of the fact that no statement was made by the Court of Civil Appeals in its opinion, we feel that we should call to the attention of the court the fact that the evidence in the case was highly conflicting. There was no controversy as to this being a fact at any stage of the proceedings in this case.

We would call the court's attention to our argument upon this proposition on page 8 *et seq.* of our brief in this cause and on pages 6 and 7 of our suplemental brief filed herein.

3. The court erred in holding that the Thirteenth Assignment of Error was not well taken and in holding that the court below did not err in its charge in directing a recovery in favor of plaintiff, appellee herein in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox in that under the charge in such case the entering must have been lawful and the recovery is permitted solely for unlawful remaining without unlawful entry.

We would call the court's attention to our argument upon this proposition on page 20 *et seq.* of our brief in this cause.

4. The court erred in holding that the Second Assignment of Error was not well taken, in that it held that the court below did not err in the third paragraph of its charge and in the fourth
79 paragraph in so far as it is in connection with the third, in directing a verdict for plaintiff if the jury should find and believe from a preponderance of the evidence that the facts in said third and fourth paragraphs set out existed, in so far as it submitted to the jury the issue as to whether or not P. O. Cox was, on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico Hamilton County, Texas, in that there is absolutely no scintilla of evidence warranting the submission of such issue, there being no proof of any kind, character or description, by inference or otherwise, in the evidence that any license was ever issued by any person to the said P. O. Cox or that he was a licensed retail dealer.

We call the court's attention to our statement and argument upon this proposition on page 12 *et seq.* of our brief in this cause and our general argument on the principle involved in the 4, 5, 6, 7, 8 and 9 Assignments herein on page 1 *et seq.* of our supplemental brief filed herein, as the supplemental brief deals fully with the reply made to our original assignments of error by the appellee in his brief and the ground given by the court as its reason for overruling the assignments.

5. The court erred in holding that the Third Assignment of Error was not well taken in that it held that the verdict of the jury was not contrary to the law and without evidence to support it, in that there is absolutely no evidence or scintilla thereof that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico, Hamilton County, Texas, it appearing that no license was introduced in evidence and that no proof of any kind was made to supply the failure to introduce the license.

We would call the court's attention to our argument upon this proposition on page 14 of our brief in this cause.

6. The court erred in holding that the Fourth Assignment of Error was not well taken in that it held that the court below did not err in directing a verdict for the plaintiff in any event under
80 the evidence, for that there is no evidence or scintilla thereof going to show that P. O. Cox was ever a licensed retail liquor dealer in the city of Hico.

We would call the court's attention to our argument on this proposition on pages 14 and 15 of our brief in this cause.

7. The court erred in holding that the Fifth Assignment of Error was not well taken in that it held that the court below did not err in the third paragraph of its charge, and in the fourth paragraph in so far as it is in connection with the third, in directing a verdict for plaintiff if the jury should find and believe from the preponderance of the evidence that the facts in said third and fourth paragraphs set out existed in so far as it submitted to the jury the issue as to whether or not P. O. Cox was, on or about the 30th day of May, 1902, a licensed retail liquor dealer in Hico, Hamilton County, Texas, in that it appears from the pleadings, the only place in which a license

is mentioned, that a license was issued to P. O. Cox & Co., retail liquor dealers in Hico, Hamilton County, Texas, and while the pleadings allege that P. O. Cox was doing business under the name of P. O. Cox & Co., yet there is no scintilla of evidence to show or indicate that P. O. Cox was doing business under the name of P. O. Cox & Co., and in holding in substance that the question raised by this assignment could not be raised on appeal because not sufficiently made in the court below.

We would call the court's attention to our argument upon this proposition on pages 25 and 26 of our brief in this cause.

8. The court erred in holding that the Sixth Assignment of Error was not well taken in that it held in substance that the verdict of the jury was not contrary to the law and the evidence, in that there is absolutely no evidence to show that P. O. Cox was doing business in the name of P. O. Cox & Co., there being no evidence or scintilla thereof upon the subject in the record and every inference in the record that can be drawn upon the subject goes to show that P. O. Cox & Co. was a firm composed of at least two persons, and in holding in substance that the question presented by this assignment could not be raised on appeal because not sufficiently raised in the court below.

81

We would call the court's attention to our statement and argument upon this proposition on page 26 of our brief in this cause.

9. The court erred in holding that the Seventh Assignment of Error was not well taken in that it held that the court did not err in its charge to the jury in assuming that P. O. Cox was doing business under the name of P. O. Cox & Co., for that there is absolutely no evidence in the record warranting the said assumption, and in that it held in substance that the question presented by this assignment could not be raised on appeal because not sufficiently raised in the court below.

We would call the court's attention to our statement and argument upon this proposition on page 26 *et seq.* of our brief in this cause.

10. The court erred in holding that the Eighth Assignment of Error was not well taken in that it held that the court below did not err in submitting to the jury, in its charge, continually and with reiteration, the issue as to the entry of the said Thompson into the said saloon, with or without the consent of some person authorized to give consent, for that the court had erroneously permitted the father of the said Thompson to testify that he did not give his consent to the said entry, and the continual reiteration of the said issue had a tendency to direct the jury's mind unduly to the testimony of the father, and had a tendency to cause it to give undue weight to the fact that the entry was made without the consent of the father, and had a tendency to cause it to find for the plaintiff upon the issue of the entry and remaining, to the injury of the defendant, and said issue, which was immaterial and irrelevant, was given undue prominence in the case, and there being no dispute as to the facts of the said issue, it in its nature, must have injuriously affected the case of defendants before the jury.

We would call the court's attention to our statement and argu-

ent upon this proposition on page 16 *et seq.* of our brief in this cause.

11. The court erred in holding that the Ninth Assignment of Error was not well taken in that it held that the court low did not err in its charge to the jury wherein the jury is in-ucted as to the form of its verdict if it found for plaintiff, in that e charge does not inform the jury as to the form of its verdict if found for defendants, thereby probably leading the jury to infer believe that the Court thought that in no contingency could it d for the defendants.

12. The court erred in holding that the Tenth Assignment of ror was not well taken in that it held that the court below did not in its charge in that the same is contradictory and confusing, and the nature thereof undoubtedly affected injuriously the case of e defendants, in that in the fourth paragraph of its charge it in-ucts the jury directly to find for the plaintiff on the issue of entry d remaining, if they believed from the preponderance of the evi-nce that the defendant Cox, or his agents, permitted W. W. Thomp-n to enter and remain in his house or saloon, wherein it was con-ucting the business of a retail liquor dealer, if the said Thompson s then and there under the age of twenty-one years, this paragraph ing short, consise and complete within itself and without quali-ation. And in the fifth paragraph of the court's charge, which quite lengthy, the court undertakes, in some measure, to avoid the fect of the fourth paragraph by charging the jury, amongst other ings, that if the jury believes from the evidence that the said hompson entered the said saloon for the purpose of procuring toxicating liquor, and that the same were sold to him, and that the rsons selling the same did so in good faith, believing him to be enty-one years of age and having good grounds for such belief, d that said Thompson did not remain in said saloon for a longer me than was necessary, under the circumstances, to procure said quor, that is, to purchase, drink and pay for same, that it should d for the defendant, but in the same paragraph of the same charge the converse of the proposition is given, making the fifth paragraph of the charge a complete charge in itself upon all phases of the entry and remaining that could be submitted this case, and making it a complete exposition of the law of the me unless another assignment of error that we make herein should well taken, and said fifth paragraph uses no words purporting to ualify the fourth paragraph. The effect of the two charges is such at an absolute and positive irreconcilable conflict exists. The third ragraph directs a recovery absolutely without reference to any cuse, and the fourth paragraph directs a recovery conditionally, d deals with all phases of the situation.

We would call the court's attention to our statement and argu-ent upon this proposition on page 28 *et seq.* of our brief in this use.

13. The court erred in holding that the Twentieth Assignment Error was not well taken, in that it held that the court below did ot err in rendering judgment upon said bond, for that said bond is

void in that same embraces among its conditions the giving of intoxicating liquors, as well as making it a penalty to permit a minor to enter and remain in such place of business of P. O. Cox, whereas the caption of the act does not embrace nor purport to regulate the giving to minors or the entering and remaining of minors in saloons, and is violative of Section 35, Article 3, of the constitution of the State of Texas, in that it does not express in the caption the purpose of the act and thereby makes the bond more onerous than the legislature under said act, had authority to require of a retail liquor dealer.

We would call the court's attention to our argument upon this proposition on page 38 of our brief in this cause.

14. The court erred in holding that the Fourteenth Assignment of Error was not well taken in that it held that the court below did not err in its charge in directing a recovery in favor of plaintiff, appellee herein, in case the minor loitered in the saloon after purchasing and paying for the drink sold him in good faith with the knowledge and consent of Cox, in that it not being unlawful for the minor to enter and remain in the saloon for a length of time sufficient to purchase a drink and pay for the same if the
84 saloon keeper sells the same in the belief that the minor is twenty-one years of age and has good grounds for such belief, it must result that the legislature contemplated that the entry and remaining under such circumstances were not violations of the bond and that no recovery could be had for the remaining after entry under such circumstances.

We would call the court's attention to our statement and argument upon this proposition on page 20 *et seq.* of our brief in this cause.

15. The court erred in holding that the Nineteenth Assignment of Error was not well taken in that it held that the court below did not err in overruling defendant's general demur-er to the petition and submitted any question to the jury as to recovering a penalty, for no penalty could be recovered or imposed in the state of Texas unless for an offense defined by the written laws of said state and for which a penalty is affixed by law, and there is no statute in this state defining it as an offense for a minor to enter and remain in a saloon, and it not being so defined as an offense, no penalty can be imposed therefor by requiring the giving of a bond.

We would call the court's attention to our statement and argument upon this proposition on page 35 of our brief in this cause.

16. The court erred in holding that the Twelfth Assignment of Error was not well taken in that it held that the court below did not err in permitting or directing a verdict in favor of the plaintiff herein in any event under the evidence, for that the evidence shows that the application made by P. O. Cox was for a license to do business at two separate and distinct places, and the allegation that license was issued to do business at the place in the application mentioned shows that the license was void upon its face even though the court should hold that it was not necessary to introduce the license in evidence or make proof that the license was issued.

We would call the court's attention to our statement and argument upon this proposition on page 18 *et seq.* of our brief in this cause.

17. The court erred in holding that the Seventeenth Assignment of Error was not well taken in that it held that the court below did not err in that it submitted any issue of liability upon the bondsmen and the sureties in this case, for that the bond sued on is a statutory bond and is more onerous than same could be legally made, and is more onerous than is required by law, in that same is a joint and several obligation, and binds the maker and sureties thereon, jointly and severally, and their heirs, executors and administrators for the payment of same, whereas said bond being a penal bond all liability upon same if in conformity with the statute would cease upon the death of the maker thereof, and could only be a joint bond and not a joint and several bond.

We would call the court's attention to our statement and argument upon this proposition on page 32 *et seq.* of our brief in this cause.

18. The court erred in holding that the Eleventh Assignment of Error was not well taken in that it held that the court below did not err in the sixth paragraph of its charge, in that it charged that if the plaintiff did not consent to such sale to his son they should find for the plaintiff, and immediately afterwards charged that if they believed the sale was made in good faith to find for the defendants, in that same, taken as a whole, is contradictory and would mislead and confuse the jury.

We would call the court's attention to our statement and argument upon this proposition on page 54 of our brief in this cause.

And now having pointed out to the court the manifold and manifest errors of the honorable Court of Civil Appeals, appellants pray that the honorable Supreme Court will grant them a writ of error in this cause and reserve and render or remand the cause as to it may seem proper.

Appellants would state that the attorneys for the appellee are Maine & Chesley whose postoffice address is Hamilton, Texas.

DEWEY LANGFORD,
ORRICK & TERRELL,
Attorneys for Appellants.

(Endorsed:) P. O. Cox *et als. vs.* W. B. Thompson. Application for Writ of Error. Refused. Orrick & Terrell Att'ys. App. No. 4586. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Mar. 15, 1905. R. H. Connerly, Clerk. Filed in Supreme Court. March 18, 1905. F. T. Connerly, Clerk. by J. S. Myrick, Deputy.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing 16 pages contain a true and correct copy of the petition for Writ of Error filed in this court by P. O.

Cox, in application No. 4586, P. O. Cox *et als. vs.* W. B. Thompson.

Witness my hand and the seal of said court, this the 10th day of April A. D. 1905.

[SEAL.] F. T. CONNERLY, *Clerk.*

(Endorsed:) Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Apr. 10, 1905. R. H. Connerly, Clerk.

Judgment of Supreme Court.

In Supreme Court of Texas, 3rd District.

P. O. COX ET AL.
vs.
W. B. THOMPSON.

MARCH 23, 1905.

This day came on to be heard the application of P. O. Cox *et al.* for a writ of error to the Court of Civil Appeals for the Third District, and the same having been duly considered, it is ordered that said application be refused; that the applicants P. O. Cox, Sam Levy and W. M. Evans and their sureties, W. J. Hefley and C. J. Swasey, pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas,
87 hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court, this the 8th day of April, A. D. 1905.

[SEAL.] F. T. CONNERLY, *Clerk.*
By J. S. MYRICK, *Deputy.*

(Endorsed:) Application No. 4586 P. O. Cox *et al. vs.* W. B. Thompson. Copy of Judgment in Supreme Court Application for Writ of Error. Refused. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Apr. 8, 1905. R. H. Connerly, Clerk.

Bill of Costs.

Clerk's Office, Supreme Court.

Certified Copy Bill of Costs, Supreme Court.

No. 4586.

P. O. COX ET AL.
vs.
W. B. THOMPSON.

ling Application	.50
ocketing Petition	.50
ntering Appearance of Counsel	.50
ling Two Briefs	.60
ling Three Papers	.90
ntering Orders	.50
ntering Judgment on Application	1.00
rtified Copy of Judgment	1.00
axing Costs of Application	.50
rtified Copy Bill of Costs	1.00
Total	$7.00

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above copy of the original bill of costs true and correct.

Witness my hand and seal of said Court, at Austin, this the 8th y of April, 1905.

[SEAL.] F. T. CONNERLY, *Clerk.*

(Endorsed:) Application No. 4586. Certified Copy Bill of Costs Supreme Court, Austin. P. O. Cox *et al. vs.* W. B. Thompson. .00. Filed in Court of Civil Appeals 3rd Supreme Judicial Dis- ict, Austin, Texas. Apr. 8, 1905. R. H. Connerly, Clerk.

Petition for Writ of Error.

the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. COX ET AL., Plaintiffs in Error,
vs.
W. B. THOMPSON, Defendant in Error.

the Honorable H. C. Fisher, Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas:

Your petitioners, P. O. Cox, Sam Levy and W. M. Evans, re- ectfully show that heretofore to-wit on the 23rd day of March

1904, there was tried in the District Court of Hamilton County, Texas in the town of Hamilton, County of Hamilton, State of Texas, a case in which W. B. Thompson was plaintiff and P. O. Cox, Sam Levy and W. M. Evans were defendants.

The declaration of the plaintiff in said cause was a petition for the recovery of penalties against P. O. Cox as principal and Sam Levy and W. M. Evans as sureties for the violation of the conditions of his bond as a retail liquor dealer, namely in that he allowed
89 W. W. Thompson, the minor son of plaintiff, W. B. Thompson, to enter and remain in his house or place of business for the selling of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, three times on the 30th day of May, 1902. And also for selling & giving to his minor son, W. W. Thompson, intoxicating liquors upon said date and to recover the sum of $500 as a penalty for each time he entered and remained and $500 as a penalty for each sale and gift that was made to him of intoxicating liquors in said place of business for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to be drunk upon the premises, a copy of which said law and amendments thereto under which said suit was brought is hereto attached and marked Exhibit A. He also alleged that Cox was a duly licensed dealer and that his bond was given as required by law, said bond being the bond sued on.

Upon the trial of said cause in said city, your petitioners demurred both generally and specially to plaintiff's said petition upon the following grounds amongst others to-wit:

A general demurrer, and also by special demurrer, because the act under which said suit was brought and under which said bond was required to be executed, was unconstitutional and violative of Section I of the Fourteenth Amendment to the Constitution of the United States; because same was class legislation and that it denied to the plaintiffs in error that protection of the laws given to other persons similarly situated in the state; because it deprived plaintiffs in error of their property without due process of law, for that under the statutes of the state of Texas it is provided that no person shall be punished in the state of Texas for any act or omission unless same is made a penal offense and a penalty affixed thereto by the written laws of the state, and the recovery sought to be had was a recovery upon the bond that was a penalty and for an act or omission which was not defined by the statutes of the State of Texas and for the violation of which no penalty was affixed by the laws of the state of Texas; because the provisions of the act cast special burdens and penalties upon those engaged in the sale of wines made from other
90 fruits than grapes and wines made from grapes not grown in the state of Texas and wines made from grapes grown in the state of Texas while not in the hands of the manufacturer or producer thereof, as distinguished from those engaged in the sale of wines made from the grapes grown in Texas while in the hands of the producer or manufacturers thereof; also because said act granted special privileges to the manufacturers of wines made from grapes grown in the state of Texas while in the hands of the manufacturer or producer thereof, as contradistinguished from other people en-

ıged in the handling of wines made from other fruits than grapes rown in the state of Texas while in the hands of the manufacturer r producer thereof, and because said act in requiring such bond and rescribing penalties for the violation of its conditions in effect eprives plaintiffs in error of their property without due process of aw.

Which said demurrer was overruled and the case was tried and subnitted to the jury on the charge of the court, and that thereafter n the 22nd day of March, 1904 a verdict was returned in said cause gainst the defendants finding three infractions of the bond by ntering and remaining and three infractions of the condition of the ond for sales to the said minor son of plaintiff, and assessed the amages at $500 for each entry and remaining and at $500 for each le made to said minor, and judgment was accordingly entered gainst the defendants for $3000 and costs.

And thereupon said defendants who allege and represent to this ourt that they are citizens of the United States and of the State of exas, appealed from the decision of the said court to the Court of ivil Appeals for the Third Supreme Judicial District of the State f Texas, in which court among other things, it was assigned as error hat the court below had erred in overruling defendant- general emurrer to the said petition and in submitting any question to the ury as to the recovering a penalty for violating the conditions of aid bond, for that no penalty could be recovered or imposed in the tate of Texas unless for an offense defined by the written laws of said state and for which a penalty is affixed by law, and that there was no statute in the state defining it as an offense for a minor to enter and remain in the saloon and no penalty ould be imposed and recovered therefor by requiring the giving f a bond. And also assigned for error that the court erred in giving udgment against the defendants on said bond, for that the law reuiring the giving of the same and giving a recovery thereon is nconstitutional being violative of Section 1 Article 14 of the United tates Constitution, and by appropriate propositions thereunder aised the question of the constitutionality of said act as tested by the onstitution of the United States, Section 1 Article 14 of amendments ereto.

That upon the trial of the said cause in the Court of Civil Appeals or the Third Supreme Judicial District of Texas, the judgment of aid court below was affirmed and the objections urged against the alidity of the statute requiring retail liquor dealers to give bonds n the manner prescribed by the statute were considered and all verruled, and especially the one which urged that the statute reerred to is obnoxious to the Fourteenth *Assignment* of the Federal onstitution as construed in the case of Connolly *vs.* Sewer Pipe Co. y the Supreme Court of the United States. That by said court it as adjudged that the provisions of Chapter A-1 Title CIV of the evised Statutes of the State of Texas and the amendments thereto hapter 158 of the Acts of the Legislature of 1897 of the general aws of said state which made it unlawful for any person to engage n the sale of spirituous, vinous or malt liquors or medicated bitters apable of producing intoxication, to be drunk on the premises, until

he should pay the occupation tax levied under said law and enter into a bond in the sum of five thousand dollars with at least two good, lawful and sufficient sureties payable to the state of Texas, and to be approved by the County Judge, conditioned that said person, firm or association of persons so selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication in any quantity to be drunk on the premises, shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication,
92 that such person, firm or association of persons or his agent or employé will not sell or permit to be sold in his or their house or place of business, nor give or permit to be given, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication to any person under the age of twenty-one years, or to a student of any institution of learning or to any habitual drunkard or to any person after being notified in writing through the sheriff or other peace office- by the wife, mother, daughter or sister of the said person not to sell — such person, and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business, and also further conditions not involved in this case which appears fully from an inspection of the copy of said act which is attached hereto and made a part hereof, and which acts provide a penalty of $500 for the infraction of each of the conditions of said bond.

Article 5060*i* of said act, however, exempts from the provisions of said act persons selling wines manufactured from grapes grown in Texas while in the hands of the manufacturers or producers thereof, was a good and valid law and was not obnoxious to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

That said Court of Civil Apeals in effect held that same was not in conflict with the provisions of Section 1 of the Fourteenth Amendment of the Federal Constitution, in that the provisions of said act did not deprive citizens of the United States and of the State of Texas of rights, privileges and immunities secured to other citizens of the United States and of the State of Texas, nor of liberty or property without due process of law, nor of the equal protection of the law, all of which appears in the record, opinion and final judgment of the said Court of Civil Appeals affirming the judgment of the District Court of Hamilton County, Texas.

Your petitioners represent and show to the court that on the 15-day of March, 1905 a petition for writ of error was filed in the said Court of Civil Appeals to the Supreme Court of the State of Texas, and filed in the Supreme Court March 18th, 1905 in which said petition for writ of error said above mentioned questions were
93 fully raised and discussed, and that the said Supreme Court on the 22nd day of March, 1905 refused to grant your petitioners herein a writ of error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas. That said judgment of the Court of Civil Appeals thereby became and is a final judgment and is the highest court of the state of Texas at law or in equity in which a decision in said suit could or can be had.

Your petitioners further show that the federal questions were made in said cause in to-wit as hereinbefore set out, and that said questions were also made in the petition for a writ of error to the Supreme Court of the State of Texas, which said writ was refused, and that the said judgment of said Court of Civil Appeals was in favor of the validity of the said law and bond and penalties prescribed thereby hereinbefore referred to, a copy of which law is hereunto attached, in holding that same was not in violation of Section 1 of Article 14 of the Amendments to the Federal Constitution, and that the decision of said question was necessary to the judgment rendered.

Wherefore your petitioners present herewith an exemplified transcript of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas in said case and pray that a writ of error to said Court of Civil Appeals for the Third Supreme Judicial District of Texas be allowed, that citation be granted and signed, that the bond herewith presented be approved, that upon compliance with the terms of the statute in such cases made and provided, that said bond and writ of error may operate — a supersedeas and that the errors complained of may be reviewed in the Supreme Court of the United States and that the judgment of said Court of Civil Appeals for the Third Supreme Judicial District of Texas be reversed.

SAM LEVY,
W. M. EVANS,
P. O. COX,
By DEWEY LANGFORD AND
ORRICK & TERRELL,
Attorneys and Counsel for Petitioners.

94 The writ of error as prayed for in the foregoing petition is allowed this 10th day of April, 1905, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of Seven Thousand Dollars.

Dated at Austin this 10th day of April, 1905.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

Filed in my office — day of ——, A. D., 1905.

——— ———,
Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

Title CIV. Chapter 1 A.

Revised Statutes of 1895. P. 1024.

Article 5060*a*. Hereafter there shall be collected from every person firm or association of persons selling spirituous, vinous, or malt liquors, or medicated bitters, within this state, an annual tax on

each separate establishment as follows: For selling spirituous, vinous, or malt liquors in quantities of one gallon or less than one gallon, three hundred dollars; for selling such liquors in quantities of one gallon or more than one gallon three hundred dollars; provided that in selling one gallon, the same may be made up of different liquors in unbroken packages, aggregating not less than one gallon. For selling malt liquors exclusively, fifty dollars; provided, that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous or malt liquors, or medicated bitters, on the prescription of a physician, or otherwise, from the payment of the tax herein imposed; provided further, that this article shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous or malt liquors, or medicated bitters on the prescription of a physician, or otherwise, from the payment of the tax herein imposed: provided
95 further, that this article shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous, or malt liquors, or medicated bitters, on the prescription of a physician, or otherwise, from the payment of the tax herein imposed; provided further, that this article shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous, or malt liquors are used, and which compounds are not intoxicating beverages prepared in evasion of the provisions of this chapter.

Article 5060*b*. The commissioner's court of the several counties in this state shall have the power to levy and collect from every person or association of persons selling spirituous, vinous, or malt liquors, or medicated bitters, a tax equal to one-half the state tax herein levied; and where any such sale is made in any incorporated city or town, such city or town shall have the power to levy and collect a tax upon such sale equal to that levied by the commissioner's court of the county in which such city or town is situated.

Article 5060*c*. Every person, firm or association of persons desiring to engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters, shall, before he or they commence the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell such spirituous, vinous or malt liquors, or medicated bitters, an application for license to engage in the sale of such liquors or medicated bitters. Said application shall be made on oath, on forms to be provided by the comptroller, and shall designate the place at which it is proposed to carry on the sale of such liquors or medicated bitters; if in a city, the street and number of the house shall be given, and the quantities in which he or they propose to sell, whether one gallon or more than one gallon, one gallon or less than one gallon, or whether they desire to sell malt liquors exclusively; and shall also state in said application whether or not said liquors are to be sold to be drunk on the premises and shall pay to the collector of taxes of the county in which he or they propose to sell such spirituous, vinous, or malt liquors, or
96 medicated bitters, the entire annual tax herein levied, according to the quantities in which he or they propose to sell, and

the entire annual tax upon such business, as may be levied by the commissioner's court of such county, and file with the county clerk bond as required in article 5060*g* of this chapter. In case the selling of such liquors or medicated bitters be carried on in a city or incorporated town, he or they so selling shall, in addition to the state and county tax herein required to be paid, pay to the collector of taxes in such city or town such tax as may be levied on said business by such city or town and all taxes herein levied shall be paid in advance. All licenses issued under the provisions of this chapter shall be posted by the licensee in a conspicuous place in his or their place of business, and on failue to so post such license, he or they so failing shall be considered as having no license.

Article 5060*d*. Upon filing the sworn application as provided in article 5060*c*, and paying to the collector the annual state and county tax herein provided for, and filing such bond as is required by article 5060*g*, the county clerk of said county shall issue to said applicant a license to sell spirituous vinous, or malt liquors, or medicated bitters, at the place and in the manner and quantities set forth in the application, and no sale shall be made until such license is procured. The receipt of the tax collector shall be evidence of the payment of the tax. For issuing license herein provided for, county clerks shall be entitled to charge a fee of twenty-five cents for each license.

Article 5060*e*. No license shall be granted for a longer or shorter period than one year. The particular place and house in which the liquors are to be sold shall be designated in the license, and no license shall authorize any person to sell spirituous, vinous, or malt liquors, or medicated bitters, at any other place or house than that designated in the license; provided that if any person or association of persons having a license to sell such liquors, desire to change his or their place of business, such change may be made by presenting the license *ro* the clerk of the county and having the new
97 place of business inserted therein, but in no case to admit of the temporary closing of one place of business to sell at another place.

Article 5060*f*. The county clerk in each and every county in this state shall between the first and tenth day in each month, forward to the state revenue agent a sworn statement, giving the names of all persons who have filed applications for license during the preceding month, and the tax collector of each county shall keep a register in which shall be entered the names of all persons paying taxes under this chapter, with the date of payment, and shall, between the first and tenth day of each month, make to the state revenue agent a sworn report, giving the names of all persons who have paid a liquor tax during the preceding month, and the character of the tax paid by each. The reports provided for in this article shall be made upon blank forms to be furnished by the comptroller.

Article 5060*g*. And person, firm or association of persons desiring to engage in the sale of spirituous, vinous, or malt liquors or medicated bitters capable of producing intoxication, to be drunk on the premises, shall, before engaging in such sale, be required to enter into bond in the sum of five thousand dollars, provided, however, that any person, firm or corporation of persons dealing exclusively

in malt liquors shall be required to give bond only in the sum of one thousand dollars, with at least two good lawful, and sufficient sureties, payable to the state of Texas, to be approved by the county judge, conditioned that said person, firm or association of persons, so selling spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication; and that such person, firm or association of persons, or his or their agent or employé, will not sell nor permit to be sold in his or their house or place of business, nor give nor permit to be given any spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication to any person under
98 the age of twenty-one years, or to any student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, daughter, or sister of the person, not to sell to such person; and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that he or they will not permit any games prohibited by the laws of this state to be played, dealt, or exhibited in or about such house or place of business; and that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this state; and that he or they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug; and that he or they will not knowingly sell or give away any impure or adulterated liquors of any kind; which said bond shall be filed in the office of the county clerk of the county where the business is conducted, and shall be recorded by such clerk in a book to be kept for such purpose, for which service the said clerk shall be entitled to a fee of seventy-five cents; which said bond may be sued on at the instance of any person or persons aggrieved by the violation of its provisions, and such person shall be entitled to recover the sum of five hundred dollars as liquidated damages for each infraction of the condition of such bond, and the said bond shall not be void on the first recovery, but may be sued on until the full penal sum named therein shall have been recovered. In addition to civil proceedings for individual injuries, brought on said bond as above indicated, if any person or association of persons shall violate any of the conditions of the bond herein required, it shall be the duty of the county and district attorneys, or either of them, to institute suit thereupon in the name of the state of Texas, for the use and benefit of the county, and the amount of five hundred dollars as a penalty shall be recovered from the principals and sureties upon the
99 breach of any of the conditions thereof; and whenever the first or subsequent bond as required is exhausted by suit at the instance of individuals, or for the use of the county, a new

ilar bond shall be given and approved before the dealer shall have
right to further pursue the business of a liquor seller; or in case
is pending on any such bond, and the county or district attorney
ll make and file an affidavit with the clerk of the county court
t he believes the bond of the defendant will be exhausted by said
, the clerk shall at once notify the liquor dealer thereof and it
ll be the duty of the liquor dealer, within twenty days from the
e the bond is exhausted, or in other event within 20 days from
time the notice is given, to give a new bond similar to the bond
t given, to be approved in the same way; and until such new bond
iven and approved, when it is required by this chapter, the liquor
er shall not have the right to further pursue the business of selling
uors; and any person, firm or association of persons who shall sell
uors, in any quantity, to be drunk on the premises, without giving
first bond, or the new bond, as required by this chapter, shall
deemed guilty of misdemeanor, and on conviction shall be fined
same amount provided for in cases where no license has been
ained. An open house, on the meaning of this chapter, is one in
ch no screen or other device is used or placed either inside or
side of such house for the purpose of or that will obstruct the view
ough the open door or place of entrance into any such house or
ce where intoxicating liquors are sold to be drunk on the
mises. A quiet house or place of business, in the meaning of this
pter is one in which no music, loud or boisterous talking, yelling
ndecent or vulgar language is allowed, used or practiced, or any
er noise calculated to disturb or annoy any persons residing or
ng business in the vicinity of such house or place of business, or
se passing along the streets or public highways. By an orderly
se is meant one in which no prostitute or lewd woman or women
allowed to enter or remain, and it is further provided, that said
se must not contain any vulgar or obscene pictures. Any surety
such bond may relieve himself from further liability thereon by
giving the principal in said bond notice in writing that he
will no longer remain as surety on said bond and by filing with
the county judge an affidavit that such notice has been given,
if within five days after such notice if he fail to make a new
d, he shall cease to pursue said business until a new bond is given.
d any person who shall continue to pursue said business after such
davit is filed shall be guilty of a misdemeanor, and shall be
ished as provided in cases where no license has been procured;
vided, that where the sale is made in good faith, with the belief
t the minor was of age, and there is good ground for such belief,
t shall be a valid defense to any recovery on such bond.

Art. 5060*h*. An habitual drunkard, within the meaning of this
pter, is one who makes it a habit, or who habitually becomes
oxicated by the voluntary use of intoxicating liquors; and in all
s for the breach of such bond for unlawfully selling to an
bitual drunkard, the question whether or not such person is an
bitual drunkard shall be determined by the court or jury trying
h case, as any other fact.

Art. 5060*i*. The provisions of this chapter shall not apply to wines

produced from grapes grown in this state, while the same is in the hands of producers or manufacturers thereof.

1897. General Laws of Texas. P. 223.
H. B. No. 686.) Chapter 158.

An act to amend the law in regard to taxation, and to regulate the sale of liquor, by amending Article 5060*a* and Article 5060*c* of Title 104, Chapter 1*a* of the Revised Civil Statutes of Texas, and adding Article 5060*j* to said chapter.

Art. 5060*a*. Hereafter there shall be collected from every person, firm, corporation, or association of persons, selling spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, in this State, not located in any county, subdivision of a county, justice precinct, city or town, where local option is in force under the laws of Texas, an annual tax of $300 on each separate establishment, as follows: For selling such liquors or medicated bitters in quantities of one gallon or less than one gallon, $300; for selling such liquor or medicated bitters in quantities of one gallon or more than one gallon, $300; provided, that in selling one gallon the same may be made up of different liquors in unbroken packages aggregating not less than one gallon; for selling malt liquors exclusively, $50. And there shall be collected from every person, firm, corporation, or association of persons, for every separate establishment selling such liquors or medicated bitters within this State and located within a county, subdivision of a county, justice precinct, town or city, in which local option is in force under the laws, the sum of $200; provided, the same shall not be sold in such locality except on prescription and in compliance with the laws governing sales in such localities; provided, further, that nothing in this article shall be so contrued as to exempt druggists who sell spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, on the prescription of a physician or otherwise in either locality as above set forth from the payment of the tax herein imposed; provided, further, that this article shall not apply to the sale by druggists of tinctures and drug compounds, in the preparation of which said liquors or medicated bitters are used and sold on the prescription of a physician or otherwise, and which tinctures and compounds are not intoxicating beverages prepared in the evasion of the provisions of this chapter nor the local option law.

101

Article 5060*c*. Every person, firm, corporation, or association of persons, desiring to engage in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in this State as set forth in Article 5060*a* of this chapter, shall, before commencing the sale of such liquors or medicated bitters, file with the county clerk of the county on which he or they propose to sell the same, an application under oath, on forms provided by the comptroller, and shall designate the place in which it is proposed to engage in the sale of such liquors or medicated bitters, if — any city or town in which streets are named and houses numbered, the street

and number of house shall be given, and the quantities in
02 which he or they propose to sell, whether one gallon or more,
or one gallon and less than one gallon, or whether they desire
sell malt liquors exclusively; provided, in localities where local
ption is in force not more than one quart shall be sold at one time
the same person; and shall also state in said application whether
id liquors or medicated bitters are to be sold to be drunk on the
remises, or to be sold on prescription in a local option county, sub-
ivision of a county, justice precinct, town or city; and shall pay to
ne collector of taxes of the county in which such sales are to be
nade the full amount of the annual tax herein levied, and such as
nay be levied by the commissioner's court of such county and the
ty or town in which sales are to be made; and shall file with the said
erk a bond as required by Articles 5060*g* and 5060*j* of this chapter.
n case the sales are to be made in a city or incorporated town, the
xes by such city or town shall be paid to the collector of taxes of
ich city or town. All taxes herein levied or which may be levied by
county, city or town, shall be paid in advance, and upon the pay
ent of same and full compliance herewith, the county clerk of the
unty shall issue to the person, firm, corporation, or association of
ersons, a license as provided for in Article 5060*d* of this chapter,
hich said license and licenses or receipts for the tax or revenues
sued by the United States shall be posted by licensee in a con-
picuous place in his or their place of business, and on failure to so
ost such license or receipt, he or they so failing shall be considered
having no license and subject to all the pains and penalties as if
o such license had issued.

(Endorsed:) P. O. Cox *et al.*, Plaintiffs in Error, *vs.* W. B. Thompson, Defendant in Error. Petition for Writ of Error. Filed n Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Apr. 10, 1905. R. H. Connerly, Clerk.

03 *Assignments of Error.*

n the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. Cox, Sam Levy and W. M. Evans, Plaintiffs in Error,
vs.
W. B. Thompson, Defendant in Error.

Assignments of Error.

Now come the plaintiffs in error, P. O. Cox, Sam Levy and W. M. Evans, and respectfully submit that in the record, proceedings and nal judgment of the Court of Civil Appeals for the Third Supreme udicial District of Texas for the State of Texas in the above entitled natter there is manifest error in this to-wit:

I.

The Court erred in holding that the provisions of Chapter I. A. Title CIV of the Revised Statutes of the State of Texas and of the amendments thereto of the general laws of the state of Texas of 1897, Chapter 158 are not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, for that the state of Texas by and through the provisions of said Chapter I. A. Title CIV and the amendments thereto in Chapter 158 of the Acts of 1897 assume to and seek:

(1.) To deprive the plaintiffs in error and certain other citizens of the United States of America and of the state of Texas of rights, privileges and immunities secured to other citizens of the United States and of the said State.

(2.) To deprive plaintiffs in error and other citizens of the United States of their property without due process of law.

(3.) To deprive and to deny to the plaintiffs in error and
104 certain citizens and persons within the jurisdiction of the State of Texas the equal protection of the law.

II.

The Court erred in holding that the provisions of said act do not deny to plaintiffs in error the equal protection of the laws.

III.

The Court erred in holding that the said act and amendments thereto and the authority exercised thereunder and the causes of action given thereby and the penalties imposed thereunder is within the police power of the legislature of the state of Texas, and that the state of Texas has the right to discriminate between persons engaged in the same class of business.

IV.

The court erred in holding that the provisions of said act and the amendments thereto do not unlawfully discriminate between those engaged in selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication or in the selling of wines manufactured from other fruits than grapes or in the selling of wines manufactured from grapes grown in Texas while not in the hands of the manufacturer or producer thereof, as contradistinguished from those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof, which latter class is exempt from giving bonds and from incurring penalties for violating the conditions thereof as provided for in said act.

V.

The court erred in holding that the provisions of said act did not cast special burdens upon those engaged in the sale of wines manufactured from grapes or other fruits or of spirituous, vinous or malt

liquors or medicated bitters capable of producing intoxication, not cast on those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof.

VI.

The Court erred in holding that the provisions of said acts
105 are uniform in their operation throughout the state upon all citizens of the state similarly situated.

VII.

The Court erred in holding that said act does not grant special and exclusive privileges to certain citizens which is denies to plaintiffs in error and to other citizens of the state.

VIII.

The court erred in that it impliedly followed the doctrine laid down in the case of Douthit *vs.* State of Texas decided December 15, 1904 wherein the Supreme Court of this state refused to recognize the doctrine as laid down in the case of Connolly *vs.* Union Sewer Pipe Co., but followed in lieu thereof the doctrine announced in the case of the Louisiana Sugar Refining Co. *vs.* State of Louisiana, the doctrine announced in said latter case being purely upon a question of classification for taxation and was not applicable to the act herein complained of.

IX.

The court erred in holding that the provisions of said chapter and the amendments thereto of the Acts of 1897 are not in violation of Section 8, Article 1 of the Constitution of the United States which confers on Congress the exclusive power to regulate commerce among the several states.

X.

The court erred in holding said laws requiring the giving of said bond by retail dealers in spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, made such bond a valid obligation and that recovery of penalties thereon could be had against the plaintiffs in error, for that it operated to deprive the plaintiffs in error of their property without due process of law, in that the statutes of the State of Texas provide that no person can be punished in the State of Texas for any act or omission unless the same is made a penal offense and a penalty is affixed thereto by the written laws of this state, for that there is no law in the state of Texas making it a penal offense for a minor to enter and re-
106 main in a saloon and such act not being defined by the laws of the State of Texas as an offense, no penalty could be imposed therefor by requiring the giving of a voluntary bond, the recovery upon said bond being recovered as a penalty.

DEWEY LANGFORD &
ORRICK & TERRELL,
Attorneys for Plaintiffs in Error.

(Endorsed:) P. O. Cox, *et al.*, Plaintiffs in Error, *vs.* W. B. Thompson, Defendant in Error. Assignments of Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin Texas, Apr., 10, 1905.

Supersedeas Bond.

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. Cox ET AL., Plaintiffs in Error,
vs.
W. B. Thompson, Defendant in Error.

Know all men by these presents: That we, P. O. Cox, W. M. Evans and Sam Levy as principals, and the United States Fidelity & Guaranty Co. of Baltimore, Maryland as surety, are held and firmly bound unto W. B. Thompson in the full and just sum of Seven Thousand Dollars ($7,000) to be paid to the said W. B. Thompson, his successors, representatives and assigns for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 10th day of April, in the year of our Lord, One Thousand, Nine Hundred and Five.

Whereas at a regular term of the District Court of the State of Texas held in Hamilton County, Texas, on March 22, 1904
107 in the suit pending in said court between W. B. Thompson, plaintiff, and P. O. Cox, W. M. Evans and Sam Levy, defendants, a judgment was rendered against said defendants for the sum of Three Thousand Dollars besides cost of suit, and

Whereas from said judgment the said defendants appealed said case to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, which court on the 11th day of January, 1905 rendered a judgment affirming said judgment of the District Court of Hamilton County, Texas, and

Whereas a motion for rehearing was duly made in said court and overruled, and thereafter on the 15th day of March, 1905 within the time prescribed by law, a petition for a writ of error to the Supreme Court of Texas was duly filed in the Clerk's office of said Court of Civil Appeals for the Third Supreme Judicial District of Texas, and

Whereas said petition was rejected and refused by the Supreme Court of the State of Texas on the 22nd day of March, 1905, and the said defendants, P. O. Cox, W. M. Evans and Sam Levy have obtained a writ of error and filed a copy thereof in the clerk's office of the said Court of Civil Appeals for the Third Supreme Judicial District of Texas, to reverse the judgment in the aforesaid suit, and a citation to the said W. B. Thompson or his attorneys of record citing and admonishing him to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said

P. O. Cox, W. M. Evans and Sam Levy shall prosecute their said writ to effect and answer all damages and costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

[SEAL.] P. O. COX,
By SAM LEVY, *Ag't.*
SAM LEVY.
W. M. EVANS.
UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MARYLAND,
By J. J. MASSIE, *Gen'l Ag't.*

Sealed and delivered in the presence of:
W. Y. QUINCE.
C. C. ECHOLS.

108 STATE OF TEXAS, *County of Tarrant:*

On this 10th day of April, 1905 personally appeared before me, J. J. Massie who says that he is the Agent of the United States Fidelity & Guaranty Co. of Baltimore, Maryland, that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed on behalf of said corporation by authority of its board of directors, and the said J. J. Massie acknowledged such instrument to be the free act and deed of said corporation.

J. C. TERRELL, Jr.,
Notary Public in and for Tarrant County, Texas.

I hereby approve the foregoing bond and sureties this 10th day of April, 1905.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

(Endorsed:) P. O. Cox *et al.*, Plaintiffs in Error, *vs.* W. B. Thompson, Defendant in Error. Supersedeas Bond. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Apr., 10th, 1905. R. H. Connerly, Clerk.

109 *Bill of Costs of Court of Civil Appeals.*

No. 3394.

P. O. COX ET AL.
vs.
W. B. THOMPSON.

Appeal from Hamilton County.

Filing Record	.50
Docketing Cause	.50
Appearances	1.00

Filing Briefs	
Filing and Entering Motions	1.50
Orders	.70
Filing 17 Extra Papers	4.00
Judgment	1.70
Taxing Costs	1.00
Mandate	.50
Recording Opinion	1.50
Certified Copy of Bill of Costs	1.80
Certified Copy Orders to Supreme Court	.75
Transcript Fee to U. S. Sup. Crt.	2.00
Notices (9)	57.00
Issuing 1 Precept	4.50
Sheriff's Fees	1.00
Copies of Motion	.75
Costs of Sup. Crt. of Texas	3.30
	7.00
Total	$91.00

110 I, R. H. Connerly, Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, hereby certify that the foregoing 109 pages contain true and correct copies of all the proceedings had in the District Court of Hamilton County, Texas, in this Court and in the Supreme Court of Texas, as the same appear from files of this Court in Cause No. 3394, styled, P. O. Cox *et al vs.* W. B. Thompson, appeal from Hamilton County. And, I further certify that the following four pages are the original citation in error and original writ of error in said cause filed in this Court.

Witness my hand and the seal of said Court at office in Austin, Texas, this the 1st day of May, A. D. 1905.

[SEAL.]

R. H. CONNERLY, *Clerk.*

111 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. COX ET AL., Plaintiffs in Error,

vs.

W. B. THOMPSON, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals for the Third Supreme Judicial District of Texas before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between W. B. Thomp-

son who resides in Hamilton County, Texas, and who was plaintiff in the District Court of Hamilton County, Texas, and was appellee in the Court of Civil Appeals for the Third Supreme Judicial District of Texas and is defendant in error herein, and P. O. Cox who resides in Comanche County, Texas, and Sam Levy and W. M. Evans who reside in Tarrant County, Texas, who were defendants in the District Court of Hamilton County, Texas, appellants in the Court of Civil Appeals for the Third Supreme Judicial District of Texas and plaintiffs in error herein, wherein was drawn in question the validity of a statute of the state of Texas on the ground of the said statute being repugnant to the Constitution of the United States, and the decision was in favor of its validity and manifest error hath happened to the great damage of the said P. O. Cox, Sam Levy and W. M. Evans as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, then under your seal, distinctly
112 and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you may have the same at Washington on the 10th day of May, 1905, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court this 11th day of April, in the year of our Lord, 1905.

[Seal of the U. S. Circuit Court, Western Dist. Texas.]

D. H. HART,
Clerk of the United States Circuit Court for the Western District of Texas.
By SCOTT W. KEY, *Deputy.*

Allowed by
C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

A copy of this writ is this day filed in my office for use of the defendant in erro-.

R. H. CONNERLY,
Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

113 [Endorsed:] Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, April 11th, 1905. R. H. Connerly, Clerk.

114 In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

P. O. Cox ET AL., Plaintiffs in Error,
vs.
W. B. Thompson, Defendant in Error.

Citation in Error.

The United States of America to W. B. Thompson who resides in Hamilton County, Texas or his attorneys of record, Maine & Chesley who also reside in Hamilton County, Texas, Greetings:

You are hereby cited and admonished to be at the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, wherein P. O. Cox, W. M. Evans and Sam Levy are plaintiffs in error and W. B. Thompson is defendant in error, and show cause, if any there be, why — judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. C. Fisher, Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas this 10th day of April in the year of our Lord One Thousand Nine Hundred and Five.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

115 We hereby accept service of this citation and acknowledge receipt of a true copy thereof.

MAIN AND CHESLEY,
J. C. MAIN,
H. E. CHESLEY,
Attorneys of Record for W. B. Thompson.

116 [Endorsed:] Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas. Apr. 18, 1905. R. H. Connerly, Clerk.

Endorsed on cover: File No. 19,768. Texas court of civil appeals. 3d supreme judicial district. Term No. 267. P. O. Cox, Sam Levy, and W. M. Evans, plaintiffs in error, *vs.* W. B. Thompson. Filed May 16th, 1905. File No. 19,768.

FILE COPY.

Office Supreme Court U. S.
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APR 2 1906
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 266.

P. O. COX, SAM LEVY AND W. M. EVANS,

Plaintiffs in Error,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF PLAINTIFFS IN ERROR.

F. E. ALBRIGHT,
E. C. ORRICK,
J. C. TERRELL, JR.,
DEWEY LANGFORD,
Counsel for Plaintiffs in Error.

The A. B. Moore Printing House, 212 Main St., Fort Worth.

20

SUPREME COURT OF THE UNITED STATES.

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THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF PLAINTIFFS IN ERROR.

F. E. ALBRIGHT,
E. C. ORRICK,
J. C. TERRELL, JR.,
DEWEY LANGFORD,
Counsel for Plaintiffs in Error.

STATEMENT.

This suit was brought in the District Court of Hamilton County, Texas, by the State of Texas against P. O. Cox,

principal, and Sam Levy and W. M. Evans, sureties, to recover penalties upon liquor dealer's bond aggregating the sum of $6,000, alleging briefly the occupation of Cox as a licensed liquor dealer, and the execution of the bond by him with Sam Levy and W. M. Evans as sureties, and seeking to recover penalties provided in said bond for violating the conditions of said bond, as follows:

That the said P. O. Cox & Co., their agent or employe, will not sell, or permit to be sold, in their house or place of business, nor give nor permit to be given any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to anyone under the age of 21 years, and that they will not permit anyone under the age of 21 years to enter and remain in his house or such place of business. That they did sell to William W. Thompson, a person under the age of 21 years, without the knowledge or consent of anyone authorized to give same, upon six different, distinct and separate occasions, intoxicating liquors, and upon six different occasions permitted said Thompson to enter and remain in the defendant's (Cox) place of business, and sought therein to recover the total sum of $6,000 liquidated damages for the breach of said bond.

There was also filed at the same time in cause No. 267, pending on writ of error in this court, a suit by the father of said Thompson against the plaintiffs in error, seeking likewise to recover $500 for each infraction of the same condition of the bond.

Defendant answered by general demurrer and by special demurrer, attacking the constituitonality of the act giving the right of action, on the ground that the act

exempts from the provisions of the statute people engaged in the same business—that is, the selling of vinous and intoxicating liquors, providing they sell wines made from grapes grown in the state by the seller, while in the hands of the maker or producer thereof. Also by general denial and special answers, which are not necessary to be noted in this connection. [Tr., p. 10.]

On a presentation of the demurrers the court overruled same. [Tr., p. 35.] Upon the trial of the case in the case of State vs. P. O. Cox et al., verdict was rendered in favor of the State against P. O. Cox, Sam Levy, William M. Evans for $1,500 for permitting W. W. Thompson to enter and remain in the saloon three times, and in the case of P. O. Cox et al. vs. W. B. Thompson for $3,000, for three sales of intoxicating liquors and for entering and remaining in the saloon three times, $500 for each infraction of the bond. The case was duly appealed to the Court of Civil Appeals for the Third Supreme Judicial District at Austin. Among other things it was assigned as error [Tr., p. 42] that the law requiring the giving of bond was unconstitutional, being violative of Article 14 of the Constitution of the United States, and that the act requiring the giving of the bond in question and providing for penalties therein was void in that same was violative of Section 8, Article 1, of the Constitution of the United States, same being in restraint of interstate commerce. [Tr., p. 42.] Thereafter, on Jan. 11, 1905, the Court of Civil Appeals affirmed said judgment and certified said decision to the lower court for observance.

Motion for new hearing was duly made in the Court of Civil Appeals and ovrruled. Whereupon the plaintiffs

in error applied to the Supreme Court of the State of Texas for a writ of error [Tr., pp. 53-62], which writ of error was duly denied. [Tr., p. 62.] Whereupon plaintiffs in error applied for a writ of error to the Court of Civil Appeals for the Third Supreme Judicial District of Texas [Tr., p. 64], in order to bring the case before the Supreme Court of the United States, which application was duly granted by the Chief Justice of said Court of Civil Appeals and a supersedeas bond filed by P. O. Cox, Sam Levy and W. M. Evans and the United States Fidelity and Surety Company as surety, and errors were assigned to this court as follows:

ASSIGNMENTS OF ERROR.

I.

The court erred in holding that the provisions of Chapter A1, Title CIV, of the Revised Statutes of the State of Texas and of the amendments thereto of the General Laws of the State of Texas of 1897, Chapter 158, are not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, for that the State of Texas, by and through the provisions of said Chapter A-1, Title CIV, and the amendments thereto in Chapter 158 of the Acts of 1897, assume to and seek:

(1) To deprive the plaintiffs in error and certain other citizens of the United States of America and of the State of Texas of rights, privileges and immunities secured to other citizens of the United States and of the said State.

(2) To deprive plaintiffs in error and other citizens of the United States of their property without due process of law.

(3) To deprive and to deny to the plaintiffs in error and certain citizens and persons within the jurisdiction of the State of Texas of the equal protection of the law.

II.

The court erred in holding that the provisions of said act do not deny to plaintiffs in error the equal protection of the law.

III.

The court erred in holding that the said act and amendments thereto and the authority exercised thereunder, and the causes of action given thereby, and the penalties imposed thereunder are within the police power of the legislature of the State of Texas, and that the State of Texas has the right to discriminate between persons engaged in the same class of business.

IV.

The court erred in holding that the provisions of said act and the amendments thereto do not unlawfully discriminate between those engaged in selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, or in the selling of wines manufactured from other fruits than grapes, or in the selling of wines manufactured from grapes grown in Texas while not in the hands of the manufacturer or producer thereof, as contradistinguished from those engaged in the sale of

wines manufactured from grapes grown in Texas while in the hands of the producer or manufacturers thereof, which latter class is exempt from giving bond and from incurring penalties for violating the conditions thereof as provided for in said act.

V.

The court erred in holding that the provisions of said act did not cast special burdens upon those engaged in the sale of wines manufactured from grapes or other fruits or of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication not cast on those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof.

VI.

The court erred in holding that the provisions of said acts are uniform in their operation throughout the State upon all citizens of the State similarly situated.

VII.

The court erred in holding that said act does not grant special and exclusive privileges to certain citizens which it denies to plaintiffs in error and to other citizens of the State.

VIII.

The court erred in that it impliedly followed the doctrine laid down in the case of Douthit vs. State of Texas, decided Dec. 15, 1904, wherein the Supreme Court of

this State refused to recognize the doctrine as laid down in the case of Connolly vs. Union Sewer Pipe Co., but followed in lieu thereof the doctrine announced in the case of the Louisiana Sugar Refining Co. vs. State of Louisiana, the doctrine announced in said latter case being purely upon a question of classification for taxation, and was not applicable to the act herein complained of.

IX.

The court erred in holding that the provisions of said chapter and the amendments thereto of the Acts of 1897 are not in violation of Section 8, Article 1, of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several States.

X.

The court erred in holding said laws requiring the giving of said bond by retail dealers in spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, made such bond a valid obligation, and that recovery of penalties thereon could be had against the plaintiffs in error, for that it operated to deprive the plaintiffs in error of their property without due process of law, in that the statutes of the State of Texas provide that no person can be punished in the State of Texas for any act or omission unless the same is made a penal offense, and a penalty is affixed thereto by the written laws of this State, for that there is no law in the State of Texas making it a penal offense for a minor to enter and remain in a saloon, and such act not being defined by

the laws of the State of Texas as an offense, no penalty could be imposed therefor by requiring the giving of a voluntary bond, the recovery upon said bond being recovered as a penalty.

BRIEF.

FIFTH ASSIGNMENT OF ERROR.

The court erred in holding that the provisions of said act did not cast special burdens upon those engaged in the sale of wines manufactured from grapes or other fruits or of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication not cast on those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof.

SEVENTH ASSIGNMENT OF ERROR.

The court erred in holding that said act does not grant special and exclusive privileges to certain citizens which it denies to plaintiffs in error and to other citizens of the State.

FOURTH ASSIGNMENT OF ERROR.

The court erred in holding that the provisions of said act and the amendments thereto do not unlawfully discriminate between those engaged in selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, or in the selling of wines manufactured from other fruits than grapes, or in the selling of wines manufactured from grapes grown in Texas while not in the hands of the manufacturers or producers

thereof, as contradistinguished from those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof, which latter class is exempt from giving bonds and from incurring penalties for violating the conditions thereof as provided for in said act.

These assignments will be considered together as they relate to the same subject and raise the same question.

FIRST PROPOSITION UNDER FOREGOING ASSIGNMENTS.

So long as the State by its constitution and laws continues to recognize wines, beer and spirituous liquors as articles of consumption, commerce and of sale, so long must continue the duty of the Federal Court to afford such business the same measure of protection as is given to other businesses and to protect those engaged in it against unjust discrimination in so far as same is provided for under the United States Constitution.

STATEMENT.

ARTICLE XVI, CONSTITUTION OF THE STATE OF TEXAS.

Sec. 20. The legislature shall at its first session enact a law whereby the qualified voters of any county, justice's precinct, town, city (or such subdivision of a county as may be designated by the commissioners' court of said county) may by a majority vote determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits.

TITLE LXIX. R.S. 1895

Article 3384. The commissioners' court of each

county in the State, whenever they deem it expedient, may order an election, to be held by the qualified voters of said county, or of any justice's precinct, or such subdivisions of a county as may be designated by the commissioners' court of said county, or any town or city therein, to determine whether or not the sale of intoxicating liquors shall be prohibited in such county, justices' precinct, or subdivision of such county, or in any town or city; provided, it shall be the duty of said commissioners' court to order the election aforesaid whenever petitioned to do so by as many as two hundred and fifty voters in any county, or fifty voters in any justice's precinct, or subdivision of such county, as shall be designated by said court, or in any city or town, as the case may be; provided, that if the justice's precinct, or subdivision of such county, embrace within its limits an incorporated town or city, or portions thereof, then such election shall only be ordered when the petition for the same is signed by qualified voters, not less than one-tenth in number of the total vote cast for governor at the next preceding general election in such incorporated town or city; and in case an election is asked for a subdivision of such county, the petition shall describe such subdivision by metes and bounds, and the said petition and description of said subdivision shall be recorded in full in the minutes of the commissioners' court, and such description shall be embraced in the notice given for such election; provided, no city or town shall be divided in making any such subdivision.

Article 3396. When any such election has been held and has resulted in favor of prohibition, and the aforesaid

court has made the order declaring the result, and the order of prohibition, and has caused same to be published as aforesaid, any person who shall thereafter, within the prescribed bounds of prohibition, sell, exchange or give away, with the purpose of evading the provisions of this title, any intoxicating liquors whatsoever, or in any way violate any of the provisions of this title, shall be subject to prosecution by information or indictment, and shall be punished as prescribed in the Penal Code.

The State of Texas, by the above provision contained in its constitution and laws enacted thereunder recognizes the sale of wines, beer and spirituous liquors within its borders, except where prohibited by laws enacted under the foregoing section of the constitution, and acting upon the requirement of said constitutional provision the legislature has provided, among other things, the provision for holding local option elections and likewise provided as to the effect of said elections in prohibiting the sale of wines, beer and liquors within the scope of country embraced within such elections, but under Chapter CIV 1a of the Revised Statutes of Texas hereinafter fully referred to, they provide for the sale of whiskies, wines, beer and medicated bitters capable of producing intoxication in quantities of one gallon or less, under regulations prescribed by said chapter. By so providing in its constitution and enacting a law prohibiting the sale within specified limits in the rest of the State in which local option elections have been carried in favor of local option, the State recognizes the right to pursue the business of a retail liquor dealer under such regulations as may be prescribed by law and subject to such occupation taxes as may be imposed under its Constitution and laws.

Tr., pp. 8 and 9, P. O. Cox applied for license to engage in the sale of liquors in quantities of one gallon or less, to be drunk on the premises in the J. A. Gambler building in the town of Hico, Hamilton County, Texas, and executed a bond, which bond is as follows:

The State of Texas, County of Hamilton:

Whereas, P. O. Cox & Co. desires to engage in the sale of spirituous, vinous or malt liquors and medicated bitters capable of producing intoxication, to be drunk on the premises, in quantities of one gallon or less, at ——, in the town of Hico, in the County of Hamilton, State of Texas, and has made application and paid the taxes required by law;

Therefore, Know All Men by these Presents, That we, P. O. Cox & Co., as principal, and Sam Levy and W. M. Evans as sureties, are held and firmly bound unto the States of Texas in the sum of five thousand dollars, for the payment of which we bind ourselves, our heirs and legal representatives, jointly and severally: Conditioned, That the said P. O. Cox & Co., principal, shall keep an open, quiet and orderly house or place of business for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, and that they or their agent or employe will not sell nor permit to be sold in their house or place of business, nor give nor permit to be given any spirituous, vinous or malt liquors and medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the

wife, mother, daughter or sister of the person, not to sell to such person; and that they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that they will not permit any games prohibited by the laws of this State to be played, dealt or exhibited in or about such house or place of business; and that they will not rent or let any part of the house or place in which they have undertaken to sell spirituous, vinous or malt liquors and medicated bitters capable of producing intoxication in any quantity to be drunk on the premises to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this State; and that they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug; and that they will not knowingly sell or give away any impure or adulterated liquors of any kind; then this obligation to be null and void, otherwise to remain in full force and effect.

Witness our hands this 21st day of May, 1892.

P. O. Cox.
Sam Levy.
W. M. Evans.

Examined and approved May 22, 1902.

J. C. Main,
County Judge Hamilton County, Texas.

The record of the case does not show that the license was issued except Tr., p. 2, where it is duly alleged in the petition that the license was procured for the purpose of engaging in the business, and that he did engage in the

business of a retail liquor dealer in the town of Hico, Hamilton County, Texas.

AUTHORITIES AND ARGUMENT.

In the companion case to this, Cox et al. vs. Thompson, reported in the 85 S. W. Rep., p. 34, the court held that no objection being made to the want of proof of the issuance of the license in the lower court, no objection could be urged against it in the Court of Appeals. The State, however, having permitted him to engage in the business of a retail liquor dealer, and he having given bond reciting the payment of the tax and issuance of the license as required by law, thereby became, to all intents and purposes, a retail liquor dealer under the laws of Texas.

We respectfully submit to the court that by virtue of the constitutional provision above referred to and the compliance by Cox with the requirements of the law making his application for license and the execution of the bond provided for by law and engaging under the law in the business of a retail liquor dealer where such business was not prohibited, that he became thereby subject to all the pains and penalties and had all the rights prescribed by the statutes of the State of Texas, which statute is fully set forth hereafter under the next proposition.

The Court of Criminal Appeals of the State of Texas, to which we respectfully invite the attention of the court (ex parte Brown, 38 Tex. Cr. Rep., 295, had under consideration a local option law passed by the legislature under Article 16, Section 20, of the constitution of the State, which law prohibited the storing for other persons in

counties in which local option had been adopted by a vote of the people, and imposed a penalty for violation thereof, and in the discussion of the above section of the Constitution says: "If we had no provision of the Constitution on the subject of local option, we believe that this act would be unconstitutional as an invasion of the fundamental right of a citizen to the free use and exercise of property, and the legislature would not be authorized under the guise of police regulation to so interfere with the enjoyment on the part of the citizen of his property right. *Intoxicating liquors are regarded as property both in the State and nation*, and it is not necessary to refer to acts of legislature or decisions of the court in which intoxicating liquors are so regarded. Furthermore, we have a distinct constitutional provision on the subject of the power of the legislature in regard to liquor traffic: "The legislature shall at its first session enact a law whereby the qualified voters of any county, justice precinct, town, city or subdivision of a county, as may be designated by the commissioners' court of such county, may, by a majority vote, determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits." It occurs to us that this expression of the will of the people on the subject is exclusive of any other method to be pursued by the legislature. *Whatever may be said as to the power of the legislatures of other States with no express provision of their constitution on this subject, to legislate in regard to liquor traffic under the general police power, same does not apply with us.* We have an express provision on the subject, and that provision was intended to

prescribe a method of dealing with the question and to exclude any other rule or method so far as local option territory is concerned, citing Holly vs. State, 14 Tex. Cr. App., 514, in which latter case was construed an act of the legislature prohibiting the giving of intoxicating liquors in local option districts, in which this question is asked, "Can the legislature, so long as this constitutional provision remains part of the organic law, in the exercise of its inherent power pass, subject to ratification by the people, an independent general law prohibiting the gift of intoxicating liquors? To concede such power it would be necessary to hold that the constitutional provision was not mandatory, but merely directory."

And, further on in the same opinion, after quoting Cooley on Constitutions, 4th ed., p. 94, lays down the doctrine that whenever the Constitution declares how power may be exercised over any subject, then no power can be exercised over that subject not clearly within the plain import of the language of the Constitution.

The same opinion further holds that "the Constitution defines the circumstances under which the people may prohibit the sale of intoxicating liquors under legislative enactment, and the legislature has attempted to extend the prohibition to a gift and to impose a penalty for giving away intoxicating liquors, which they had no authority to do. The constitution having specified the bounds within which they were to act, it was a direct assumption and usurpation of unwarranted power to go beyond these bounds."

We contend that these decisions of one of our courts of last resort, if they do not expressly decide the fact that

a right in Texas exists under the constitutional provision above referred to for the people of Texas under the limits prescribed by law to engage in the sale of intoxicating liquors, yet they do decide that the legislature can pass no act under the constitutional provision referred to except such as is contained within the terms of the provision, and cannot pass by virtue of its inherent powers an independent prohibitory act, and that this right being granted, will be protected under the Federal Constitution against unjust discrimination.

This honorable court, in this case of Scott vs. Donald, reported in 165 U. S., 110, in effect held that where the State has licensed the sale of liquor within its limits and recognized the sale of it, and importation and the consumption of it as a lawful article of consumption and commerce, so long must continue the duty of the Federal Court to afford to such businesses the same measure of protection under the Constitution and laws of the United States as given to other articles.

We respectfully refer your honorable court also to the case of Mulger vs. Kansas, 123 U. S., 273, holding that if a statute purported to be an act to protect the public health, the public morals or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the court to so adjudge and thereby give effect to the Constitution.

We respectfully refer the court likewise to the case of Walling vs. Michigan, 116 U. S., 446, in which, among other things, the court says that the police power cannot be set up to control the inhibitions of the Federal Consti-

tution or the powers of the United States created thereby.

In the case of Leslie vs. Harding, 105 U. S., it is again recognized that ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in which a right of traffic exists.

We also refer to the case of the State of Minesota vs. Barber, which, while not upon the same subject, involves the same principle. Also the case of Plumley vs. Massachusetts, 105 U. S., 471.

The deductions from these cases and the principles involved establish conclusively the proposition that where a State recognizes by its laws the engaging in the sale of any commodity as a business in the State, that under the federal laws that same protection will be extended to all alike who are thus permitted to engage in such business. Subject to such legitimate regulations as may be imposed by the State, we also respectfully call the court's attention to the case of Vance vs. Vander, Cook & Co., 170 U. S., 438, and under the following proposition will discuss the main issue in the case.

SECOND PROPOSITION.

The discrimination in the Revised Statutes of the State of Texas of 1895, Title CIV, Chapter A-1, and the amendment thereto of the acts of 1897 in favor of the dealer in wines made from grapes grown in the State of Texas while in the hands of the maker or producer thereof, exempting them from the giving of a bond and from incurring penalties for the violations of the conditions of such bond, and imposing such penalties on all other dealers in liquors, wines, beer or medicated bitters, and on all other dealers in wines made from other products than grapes, is repugant to the Consti-

tution of the United States, Fourteenth Amendment thereof, in respect to the equal protection of such dealers under the laws of the State of Texas.

STATEMENT.

We respectfully refer your honorable court to the [redacted] statutes of the State of Texas, which are as follows, regulating the sale of intoxicating liquors in the State of Texas:

TITLE CIV., CHAPTER 1A.

Revised Statutes of 1895.

Article 5060a. Hereafter there shall be collected from every person, firm or association of persons selling spirituous, vinous or malt liquars, or medicated bitters, within this State, an annual tax on each separate establishment, as follows: For selling spirituous, vinous or malt liquors in quantities of one gallon or less than one gallon, three hundred dollars; for selling such liquors in quantities of one gallon or more than one gallon, three hundred dollars; provided, that in selling one gallon the same may be made up of different liquors in unbroken packages, aggregating not less than one gallon. For selling malt liquors exclusively, fifty dollars; provided, that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous or malt liquors, or medicated bitters, on the prescription of a physician or otherwise, from the payment of the tax herein imposed; provided, further, that this article shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous or male liquors

or medicated bitters, on the prsecription of a physician or otherwise, from the payment of the tax herein imposed; provided, further, that this article shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous or malt liquors are used, and which compounds are not intoxicating beverages prepared in evasion of the provisions of this chapter.

Article 5060b. The commissioners' court of the several counties in this State shall have the power to levy and collect from every person or association of persons selling spirituous, vinous or malt liquors, or medicated bitters, a tax equal to one-half of the state tax herein levied; and where any such sale is made in any incorporated city or town, such city or town shall have the power to levy and collect a tax upon such sale equal to that levied by the commissioners' court of the county in which such city or town is situated.

Article 5060c. Every person, firm or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors or medicated bitters, shall, before he or they commence the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell such spirituous, vinous or malt liquors or medicated bitters, an application for license to engage in the sale of such liquors or medicated bitters. Said application shall be made on oath, on forms to be provided by the comptroller, and shall designate the place at which it is proposed to carry on the sale of such liquors or medicated bitters; if in a city, the street and number of the house shall be given, and the quantities in

which he or they propose to sell, whether one gallon or more than one gallon, one gallon or less than one gallon, or whether they desire to sell malt liquors exclusively, and shall also state in said application whether or not said liquors are to be sold to be drunk on the premises; and shall pay to the collector of the county in which he or they propose to sell such spirituous, vinous or malt liquors or medicated bitters the entire annual tax herein levied, according to the quantities in which he or they propose to sell, and the entire annual tax upon such business as may be levied by the commissioners' court of such county, and file with the county clerk bond as required in Article 5060g of this chapter. In case the selling of such liquors or medicated bitters be carried on in a city or incorporated town, he or they so selling shall, in addition to the State and county tax herein required to be paid, pay to the collector of taxes in such city or town such tax as may be levied on said business by such city or town, and all taxes herein levied shall be paid in advance. All licenses issued under the provisions of this chapter shall be posted by the licensee in a conspicuous place in his or their place of business, and on failure to so post such license, he or they so failing shall be considered as having no license.

Article 5060d. Upon filing the sworn application as provided in Article 5060c, and paying to the collector the annual State and county tax herein provided for and filing such bond as is required by Article 5060g, the county clerk of said county shall issue to said applicant a license to sell spirituous, vinous or malt liquors or medicated bitters at the place and in the manner and quanti-

ties set forth in the application, and no sale shall be made until such license is procured. The receipt of the tax collector shall be evidence of the payment of the tax. For issuing licenses herein provided for, county clerks shall be entitled to charge a fee of twenty-five cents for each license.

Article 5060e. No license shall be granted for a longer or shorter period than one year. The particular place and house in which the liquors are to be sold shall be designated in the license, and no license shall authorize any person to sell spirituous, vinous or malt liquors or medicated bitters at any other place or house than that designated in the license; provided, that if any person or association of persons having a license to sell such liquors desire to change his or their place of business, such change may be made by presenting the license to the clerk of the county and having the new place of business inserted therein, but in no case to admit of the temporary closing of one place of business to sell at another place.

Article 5060f. The county clerk in each and every county in the state shall, between the first and tenth day in each month, forward to the State revenue agent a sworn statement, giving the names of all persons who have filed applications for license during the preceding month, and the tax collector of each county shall keep a register, in which shall be entered the names of all persons paying taxes under this chapter, with the date of payment, and shall, between the first and tenth day of each month, make to the State revenue agent a sworn report giving the names of all persons who have paid a liquor tax during the preceding month and the character

of tax paid by each. The reports provided for in this article shall be made upon blank forms to be furnished by the comptroller.

Article 5060g. Any person, firm or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to be drunk on the premises, shall, before engaging in such sale, be required to enter into bond in the sum of five thousand dollars; provided, however, that any person, firm or corporation of persons dealing exclusively in malt liquors shall be required to give bond only in the sum of one thousand dollars, with at least two good, lawful and sufficient sureties, payable to the State of Texas, to be approved by the county judge, conditioned that said person, firm or association of persons so selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication; and that such person, firm or association of persons, or his or their agent or employe, will not sell nor permit to be sold in his or their house or place of business, nor give, nor permit to be given, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to any student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, daughter or sister of the person not to sell to

such person, and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that he or they will not permit any games prohibited by the laws of this State to be played, dealt or exhibited in or about such house or place of business; and that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this State; and that he or they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug, and that he or they will not knowingly sell or give away any impure or adulterated liquors of any kind; which said bond shall be filed in the office of the county clerk of the county where the business is conducted, and shall be recorded by such clerk in a book to be kept for such purpose, for which service the said clerk shall be entitled to a fee of seventy-five cents; which said bond may be sued on at the instance of any person or persons aggrieved by the violation of its provisions, and such person shall be entitled to recover the sum of five hundred dollars as liquidated damages for each infraction of the condition of such bond, and the said bond shall not be void on the first recovery, but may be sued on until the full penal sum named therein shall have been recovered. In addition to civil proceedings for individual injuries, brought on said bond as above indicated, if any person, firm or association of persons shall violate any of

the conditions of the bond herein required, it shall be the duty of the county and district attorneys, or either of them, to institute suit thereupon in the name of the State of Texas for the use and benefit of the county, and the amount of five hundred dollars as a penalty shall be recovered from the principals and sureties upon the breach of any of the conditions thereof; and whenever the first or subsequent bond as required is exhausted by suit at the instance of individuals, or for the use of the county a new similar bond shall be given and approved before the dealer shall have the right to further pursue the business of a liquor seller; or, in case suit is pending on any such bond, and the county or district attorney shall make and file an affidavit with the clerk of the County Court that he believes the bond of the defendant will be exhausted by said suit, the clerk shall at once notify the liquor dealer thereof, and it shall be the duty of the liquor dealer, within twenty days from the time the bond is exhausted, or, in other event, within twenty days from the time the notice is given, to give a new bond similar to the bond first given, to be approved in the same way; and until such new bond is given and approved, when it is required by this chapter, the liquor seller shall not have the right to further pursue the business of selling liquors; and any person, firm or association of persons who shall sell liquors in any quantity, to be drunk on the premises, without giving the first bond, or the new bond, as required by this chapter, shall be deemed guilty of a misdemeanor, and on conviction shall be fined the same amount provided for in cases where no license has been obtained. An open house, in the meaning of this chapter, is one in which no

screen or other device is used or placed either inside or outside of such house or place of business for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where of business for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where liquors are sold to be drunk on the premises. A quiet house or place of business, in the meaning of this chapter, is one in which no music, loud or boisterous talking, yelling or indecent or vulgar language is allowed, used or practiced, or any other noise calculated to disturb or annoy any persons residing or doing business in the vicinity of such house or place of business, or those passing along the streets or public highways. By an orderly house is meant one in which no prostitute or lewd woman or women are allowed to enter or remain; and it is further provided, that said house must not contain any vulgar or obscene pictures. Any surety on such bond may relieve himself from further liability thereon by giving the principal in said bond notice in writing that he will no longer remain as surety on said bond and by filing with the county judge an affidavit that such notice has been given, and if within five days after such notice, if he fail to make a new bond, he shall cease to pursue said business until a new bond is given. And any person who shall continue to pursue said business after such affidavit is filed shall be guilty of a misdemeanor, and shall be punished as provided in cases where no license has been procured; provided, that where the sale is made in good faith, with the belief that the minor was of age, and there is good ground for such be-

lief, that shall be a valid defense to any recovery on such bond.

Article 5060h. An habitual drunkard, within the meaning of this chapter, is one who makes it a habit, or who habitually becomes intoxicated by the voluntary use of intoxicating liquors; and in all suits for the breach of such bond for unlawfully selling to an habitual drunkard, the question whether or not such person is an habitual drunkard shall be determined by the court or jury trying such case, as any other fact.

Article 5060i. *The provisions of this chapter shall not apply to wines produced from grapes grown in this State, while the same is in the hands of producers or manufacturers thereof.*

1897. GENERAL LAWS OF TEXAS.

Chapter 158.

An Act to Amend the Law in Regard to Taxation, and to Regulate the Sale of Liquor by Amending Article 5060a and Article 5060c of Title 104, Chapter 1a, of the Revised Civil Statutes of Texas, and Adding Article 5060j to Said Chapter.

Article 5060a. Hereafter there shall be collected from every person, firm, corporation or association of persons selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in this State, not located in any county, subdivision of a county, justice precinct, city or town, where local option is in force under the laws of Texas, an annual tax of $300 on each separate establishment, as follows: For selling such liquors or medicated bitters in quantities of one gallon or less than

one gallon, $300; for selling such liquors or medicated bitters in quantities of one gallon or more than one gallon, $300; provided, that in selling one gallon the same way be made up of different liquors in unbroken packages aggregating not less than one gallon; for selling malt liquors exclusively, $50. And there shall be collected from every person, firm or corporation or association of persons, for every separate establishment selling such liquors or medicated bitters within this State and located within a county, subdivision of a county, justice precinct, town or city, in which local option is in force under the laws, the sum of $200; provided, the same shall not be sold in such locality except on prescription and in compliance with the laws governing sales in such localities; provided, further, that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous or male liquors or medicated bitters capable of producing intoxication, on the prescription of a physician or otherwise, in either locality as above set forth, from the payment of the tax herein imposed; provided further, that this article shall not apply to the sale by druggists of tinctures and drug compounds, in the preparation of which said liquors or medicated bitters are used and sold on the prescription of a physician or otherwise, and which tinctures and compounds are not intoxicating beverages prepared in the evasion of the provisions of this chapter nor the local option law.

Article 5060c. Every person, firm, corporation or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in this State, as set

forth in Article 5060a of this chapter, shall, before commencing the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell the same an application under oath, on forms provided by the Comptroller, and shall designate the place in which it is proposed to engage in the sale of such liquors or medicated bitters, if any city or town in which streets are named and houses numbered, the street and number of house shall be given, and the quantities in which he or they propose to sell, whether one gallon or more, or one gallon and less than a gallon, or whether they desire to sell malt liquors exclusively; provided, in localities where local option is in force not more than one quart shall be sold at one time to the same person; and shall also state in said application whether said liquors or medicated bitters are to be sold to be drunk on the premises or to be sold on prescription in a local option county, subdivision of a county, justice precinct, town or city; and shall pay to the collector of taxes of the county in which such sales are to be made the full amount of the annual tax herein levied, and such as may be levied by the commissioners' court of such county and the city or town in which sales are to be made; and shall file with the said clerk a bond as required by Article 5060g and 5060j of this chapter. In case the sales are to be made in a city or incorporated town, the taxes by such city or town shall be paid to the collector of taxes of such city or town. All taxes herein levied or which may be levied by a county, city or town shall be paid in advance, and upon the payment of same and full compliance herewith, the county clerk of the county shall issue to the person, firm, cor-

poration or association of persons a license as provided for in Article 5060d of this chapter, which said license and licenses or receipts for the tax or revenues issued by the United States shall be posted by license in a conspicuous place in his or their place of business, and on failure to so post such license, or receipt, he or they so failing shall be considered as having no license and subject to all the pains and penalties as if no such license had issued.

REVISED CRIMINAL STATUTES OF THE STATE OF TEXAS, 1895.

Article 411a. Any person or association of persons who shall engage in the sale of spirituous, vinous or malt liquors or medicated bitters without having obtained license therefor, shall be fined in any sum not less than the amount of the taxes so due and not more than double that sum, or imprisoned in the county jail from ten to ninety days in the discretion of the jury.

Article 411b. Any person or persons who shall sell spirituous, vinous or malt liquors or medicated bitters in quantities not authorized by his or their license, or who shall sell in any other place than that designated in the license, or who shall sell otherwise than authorized by the license, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum from fifty to one hundred dollars or imprisoned in the county jail from ten to thirty days, in the discretion of the jury; provided, that each day any person, firm or association of persons in his or their employ shall engage in the sale of spirituous, vinous or malt liquors or medi-

cated bitters in violation of this article shall constitute a separate offense.

Article 411d. Any person, firm or association of persons who shall sell liquors in any quantity to be drunk on the premises, without giving the first bond, or the new bond, as required by Article 5060g of the Revised Statutes, shall be deemed guilty of a misdemeanor, and on conviction shall be fined the same amount provided for in cases where no license has been obtained.

REVISED CRIMINAL STATUTES OF THE STATE OF TEXAS, 1895.

Article 400. Any person who shall knowingly sell or give, or cause to be given or sold, any spirituous, vinous or intoxicating liquor to any person under the age of twenty-one years, without the written consent of the parent or guardian of such minor, or someone standing in their place or stead, shall be fined not less than twenty-five nor more than one hundred dollars.

The foregoing embraces the laws regulating the sale of intoxicating liquors in this State and imposing penalties for the violation thereof.

P. O. Cox was engaged in the sale of wines, beer and whiskies under his license in the town of Hico, Hamilton County, Texas, it being alleged in the petition [Tr., p. 1] that he had procured license to do business in said place, and executed a bond with P. O. Cox as principal and Sam Levy and W. M. Evans as sureties, conditioned as required by the above statute. [Tr., p. 2.] It also appears that Cox did so engage in business [Tr., p. 26], from the evidence of John May, the man in charge of his saloon, and

that in May, 1902, that he did sell to W. W. Thompson beer, and that he was under the age of 21 years, and did enter and remain in the place of business. To this petition a general demurrer and special demurrer were urged on the ground of the unconstitutionality of the act giving the right of action sued on [Tr., pp. 5 and 6], and were duly overruled, as appears in the judgment of the court [page 35], and judgment rendered upon the verdict for $1,500, for entering and remaining three times. The same questions were again assigned as error on page 42 of transcript before the Court of Civil Appeals, section 14 thereof, which court affirmed the judgment of the lower court. In the application for writ of error to the Supreme Court [Tr., p. 53, Section 1 thereof], the constitutionality of this act was again raised and the writ of error refused to the judgment of the Court of Civil Appeals affirming the case.

AUTHORITIES AND ARGUMENT.

We respectfully invite the court's attention in this connection to the case of Douthit vs. State, reported in 98 Tex., 344, in which the constitutionality of the law in question, by reason of the discrimination set forth, was duly raised, and the Supreme Court of this State held that Article 5060i of act, which read as follows, "The provisions of this chapter shall not apply to wines produced from grapes grown in the State of Texas while in the hands of the producer or manufacturer thereof," would not affect the constitutionality of the act. That it does not make an unreasonable discrimination in favor of producers of native wines, and was not, therefore, void.

That they were unable to distinguish upon any sound principle of law the point involved in this case from that ruled upon by the Supreme Court of the United States in the case of the American Sugar Refining Co. vs. Louisiana, 179 U. S., 98, and held that the exception did not bring it within the case of Connolly vs. Union Sewer Pipe Co., 184 U. S., 450, and which latter case is now relied upon by us in this case as sustaining the above proposition, and we will discuss the difference between the two cases and demonstrate the application of the principle of the latter case to the facts in this case.

In the American Sugar Refining Co. case this court was called upon to construe an act of the legislature of Louisiana entitled "An act to levy, collect and enforce payment of an *annual license tax* upon all persons, association of persons, or business firms and corporations, pursuing any trade, profession, vocation, calling or business, except those who are expressly excepted from such license tax by articles 206 and 207 of the Constitution."

By the ninth section of that act it was enacted that for carrying on such business of refining sugar and molasses, the license shall be based on the gross annual receipts of each person, etc., engaged in said business, as follows: "Provided, that this section shall not apply to planters and farmers grinding and refining their own sugar and molasses, and providing further that it shall not apply to those planters who granulate syrup for other planters during the rolling season."

The question is squarely presented as to whether or not, by reason of said proviso, the defendant in that case was deprived of the equal protection of the law. The court

says: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable *distinction in principle*, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon difference of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of *citizens as taxpayers*, such exemptions would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this government not only to classify for purposes of taxation, but to exempt producers from the taxation on the methods employed by them to put their products upon the market. The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth and production. The act is *not* one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves or pastry, or such as one which should exempt the *farmer who devoted his corn or rye to the making of whisky*, while other manufacturers of these articles were subjected to a tax. A somewhat different question might arise in such case, since none of these articels are the natural products of the farm—such products only becoming useful by being commingled with other ingredients. Refined sugar, however, is the natural and ultimate product of the cane, and the various steps taken

to perfect such product are but incident to the original growth."

This court has directly held that the liquor business comes within the domain of domestic trade and commerce, which we have shown under the first proposition.

It does not seem possible to misconstrue the import of the foregoing decision. There it is expressly held that the act in question undoubtedly discriminates in favor of a certain class, but it is held, with more or less clearness, that in a classification for purposes of taxation more latitude is allowed than in other things, and that the policy of the government has been, for time out of mind, to exempt producers from taxation of the methods employed by them to put their products upon the market. That, therefore, while the act discriminates, yet, by reason of the latitude allowed in matters of taxation, and allowed on account of the settled policy of our government, such discrimination is held to be not repugnant to the constitution. To accentuate the meaning of the court in this regard, a case is stated almost identical with the case at bar, in which they say *that a different question might arise, to-wit: an act which would exempt the farmer who devoted his corn or rye to the making of whisky while other manufacturers of these articles were subject to a tax;* the basic principle involved being that the refining of sugar is merely the rendering more pure or the natural and ultimate product of the cane, and the various steps taken to perfect such production are but incident to the original growth.

This different question arises exactly in this case.

The distinction between this case and the case of Con-

nolly vs. Union Sewer Pipe Co., reported in 184 U. S., page 640, appears to us to be so plain and obvious that the Supreme Court of the United States would have done violence to its traditions in construing the constitution had it rendered any other decision than that referred to.

It should be borne in mind that the act of which we complain involves taxation and regulation and penalties. The caption of the act itself, which is as follows, shows this plainly: "An act to *regulate* the sale of spirituous, vinous or malt liquors or medicated bitters; to fix a *tax* upon all persons or associations of persons selling such liquors; to define the time and manner of collecting such tax; to fix *penalties* for the violation of this act, and to repeal all laws and parts of laws in conflict with the provisions of this act." [General Laws of Texas, Acts 1893, p. 158, which has been adopted in the revision of 1895.]

Now, we do not contend that this act is void as to the features contained in it with reference to taxation, *unless, of course, under the Connolly case the whole act should fall upon another principle*, but we do contend that the act, in so far as it prescribes regulations, amongst others, to-wit: the giving of the bond sued on, is void, and that it does not come within the Louisiana Sugar Refining Co. case, for the act complained of, like the one there, discriminates, and unless the effect of the discrimination should be avoided by the exceptions therein made, or some other exceptions supported by sound principles of law, it must fall.

If the act complained of provided only for the occupation tax, as did the Louisiana law, we are free to confess that more difficulty might have arisen in distinguishing

the case from the Sugar Refining Co. case, for such a state of case would have presented the exact query presented there.

The question of classification and the applicability of the Sugar Refining Co. case was duly discussed in the Connolly case, and why, with such a full discussion and with the points so sharply made between the opinions of the majority and the minority, our court could not see the difference between the case as here presented and the Sugar Refining Co. case, is a mystery to us.

The exception in our statute is so nearly identical with the exception in the Illinois statute that it is practically a verbatim copy.

If the exception in the Illinois case destroyed the Illinois statute, certainly the exception in the Texas statute should destroy that statute, unless there is some clear distinction which is supported by sound principle. The Illinois statute was for the purpose of defining the trusts and making certain acts and violations thereof misdemeanors, and prescribing punishment thereof.

The Texas act, in so far as we desire to deal with it, was an act for the regulation of retail liquor dealers, and provided, amongst other things, for the giving of the bond sued on and penalties for the violation thereof.

The distinction between the two, to the legal mind, can not be grasped unless it should be held that the whole of the Texas act is so incidental to its taxing feature that all of its provisions, except the taxing feature, will be held to be of no moment. Such a holding, upon its face, tested by sound logic and law, would be manifestly absurd, for it is apparent that the regulating features of the act are

as fully an important and integral portion thereof a the taxing feature, if not more so. The only point that can, or rather could, at that time have been made preseting a plausible reason for sustaining the act as constitutional is that it comes within the police power of the State, a point we will hereafter consider in connection with the Connolly case.

It seems to us that in deciding the question here presented the whole matter depends upon the answer given to the query propounded in the opinion of Mr. Justic McKenna, dissenting in the Connolly case, in which he says: "Can the cases be distinguished because in one a tax was imposed and in the other conduct was regulated or penalized?" This is the identical question which we now propound, waiving the distinction made in the Sugar Refining Co. case. Mr. Justic McKenna, in his dissenting opinion, answers this question as follows: "Indeed, is not the distinction verbal, each being means to an end Is not a parallel obvious? Besides, what justification for the distinction is there under the Constitution? None, I submit, can be found in the words of that instrument."

The answer to the query necessarily propounded to our Supreme Court in the Douthit case is practically identical with that of Mr. Justice McKenna, and while his answer furnishes high authority for our Supreme Court yet nevertheless it is not the highest authority, nor is it authority which ought to be followed when the answer of the majority of the court is exactly to the contrary and is the law until overruled.

The query propounded and heretofore set out makes the issue so plain that it would seem as if he who runs

may read, and recognize the fact that upon an answer to that question, which involves the very point, alone should depend the decision of this court in this case.

The answer of the majority of the court in the opinion rendered by Mr. Justice Harlan is clear, decisive and direct, leaving nothing to inference, and clearly distinguishing it from the case which Mr. Justice McKenna regarded as controlling, and which has also governed our own Supreme Court, to-wit: the Sugar Refining Co. case. After summarizing and dealing with the case, he says: "The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involve considerations that could not, in the nature of things, apply to a State enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. * * * It is one thing to exert the power of taxation so as to meet the expenses of government, and, at the same time, indirectly to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce." And here

we might remark, were it not that this decision deals expressly with the question as to whether or not the act is justifiable under the police power, it might well be contended that such was the case, but the decision pointedly answers the contention made by counsel therein and leaves no room for argument along that line. It says: "The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but, if by their necessary operation its regulations looking to either of those things amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." The very exception in terms has been passed upon, and it has been held that it is not a proper classification, and is not justified under the police power.

Can anything be plainer or more in point?

We do not doubt but that the Supreme Court of this State is thoroughly convinced of the correctness of their holding in the Douthit case, as an abstract proposition of law, for when we read in the 95 Texas, page 611, in the case of the State of Texas vs. Compress Co., which involved the constitutionality of the Texas anti-trust act, the following expression of our Supreme Court, to-wit: "We believe that our decision is correct and that the law is not in contravention of the Constitution of the State, nor of the United States," we cannot help but see that the ideas announced by Mr. Justice McKenna permeates the justices of our Supreme Court, and believing that they are fully imbued with the correctness of their decision as aforesaid, we think that the difficulty now presented, and which most forcibly presents itself to the court, is that of finding some distinction which will enable them to apply

the Sugar Refining Company case in accordance with their own views. That court, in the 95 Texas, used the following language: "We recognize the superior authority of the Supreme Court of the United States upon this question. and in obedience to its decision we shall hold that in so far as the law of 1895 comes within the terms of the Connolly case, it is invalid; it will not support an action by the State to recover a penalty for the violation of the law, nor will it in suits between corporations or individuals support a distinction based upon the fact that the right of action originated in a violation of the anti-trust law. But to the extent that the statute of this State is not embraced in the decision of the Supreme Court of the United States, we shall adhere to our former decisions that it is constitutional and valid, and therefore enforcible by the State."

The expressions in this case are strong examples of the great unwillingness which has actuated our court in following the Connolly case to the extent it did. These expressions, however, show that the Connolly case was followed by them to the extent that a penalty could not be recovered under our anti-trust act, which they hold to be in all essential particulars the same as the act of 1895. Have they not, then, in effect, answered the question propounded by Mr. Justice McKenna, by saying we do not believe that the majority opinion is correct, but it is our duty to follow it, and we do follow it, and no recovery of a penalty can be had by reason of the decision in the case.

Wherein has it in any way, in any decision, been pointed out that our statutes regulating the liquor traffic is more analogous to that under consideration in the Sugar Refin-

ing Co. case than to the anti-trust acts of Texas and Illinois? True, the liquor traffic statute contains features analogous to the Louisiana statute, because it imposed a tax, but in so far as it regulates it, to our mind, is an analogous to the anti-trust acts herein discussed as one case can well be to another. Our Supreme Court has not furnished to the profession any points wherein they make a distinction, but simply say they think the case is governed by the Sugar Refining Co. case. At some time, by some court, the distinction, if any exists, must necessarily be defined and shown, for until that time the mind of the profession will not be satisfied.

The Supreme Court of the State of Missouri, in the case of State vs. Bengsch, reported in 70 S. W. Rep., 710, on page 720 holds that a statute imposing upon manufacturers of liquor for sale in the State of Missouri a tax of 10 cents a gallon and exempting from the operation of the tax manufacturers who manufacture in that State liquors for sale in other states, unconstitutional, as violative of the Fourteenth Amendment of the Constitution, which guarantees to each citizen of the United States and of each particular State "the equal protection of the laws."

We concede, as we have always done, that the State can, for the purposes of taxation, exempt one class from the operation of the law and impose tax upon other classes of a different character, under the case of the Sugar Refining Co. vs. Louisiana, but can it under the guise of regulating the sale of intoxicating liquors, impose penalties upon one party engaged in said occupation not imposed upon another engaged in the same occupation, and would such imposition be justified as a police regulation?

The caption of the law of Texas regulating the sale of intoxicating liquors is styled: "Liquors—Sale of Regulated—Taxation. An act act to regulate the sale of spirituous, vinous and malt liquors or medicated bitters; to fix a tax upon all persons or association of persons selling such liquors; to define the time and manner of collecting such tax and to fix penalties for the violation of this act, and to repeal all laws and parts of laws in conflict with the provisions of this act."—General Laws of the State of Texas, Twenty-third Legislature, page 177.

The sections of this act are all set forth in the foregoing pages of this brief as carried forward in the Revised Statutes of 1895, under which the bond in question and involved in the suit was given.

The provisions contained in the bond taken in connection with the exemptions in Article 5060i of the act show that this is no police regulation per se and can not be justified upon that ground, for it is just as injurious to the public morals and to that of the youths for them to enter and remain in a saloon where domestic wines are sold, though in the hands of the producer, as where imported or foreign wines are sold, or wines made from other fruits. It is just as injurious for them to drink grape wines as other wines or malt or spirituous liquors. The taste for strong drink is cultivated as well by one as by the other; the habits cultivated in one place are as injurious as in the other.

The principle announced in the American Sugar Refining Co. vs. Louisiana, 170 U. S., 283, involved a question of classification for taxation purely, and no other question was involved. *Traffic in spirituous, vinous or malt*

liquors is legalized in this State, except where prohibited by elections under the local option laws, enacted under our Constitution, and dealers in it are entitled to equal protection of the laws and can not be subjected, under the guise of classification for taxation, to penalties imposed upon one class and not imposed upon another. Legislation discriminating against such articles imported from another State has been held to interfere with commerce between the States, and is void, where it is a lawful subject of sale, nor can the legislature of the State, under the guise of police regulation, enact a law that will infringe upon the rights guaranteed to the citizens of the United States by its Constitution. [See Walling vs. Mich., 116 U. S., 446.] *The sale of liquors is legal in this state by reason of our constitutional provisions and statutes*, yet we concede that the legislature has the right to tax and regulate it, but in doing so must make the statute operative so far as penalties are imposed and conditions placed upon same upon all engaged in the business alike. Mr. Harlan, in the Connolly case, states "that it is one thing to exert the power of taxation so as to mee the expense of the government, and at the same time indirectly to build up or protect property interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce and discriminate against some by declaring that particular class within its jurisdiction shall be exempt from operation of a general statute making it criminal in its effect to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exercise of the power of classification. It rests on no reasonable basis, is purely arbi-

trary and plainly denied the equal protection of the law to those against whom it discriminates." Applying this principle to the facts of the case at bar, we do not see but that if the sale of spirituous, vinous and malt liquors are injurious under the conditions and limitations embraced in the statute, and are hurtful to the morals, they should properly be so limited and restricted, yet it is impossible to perceive why the sale of domestic grape wines, in the hands of the producer or manufacturer, are not likewise injurious and should be sold under the same limitations and restrictions, except for the desire of the State to protect and encourage the manufacture of domestic grape wines in preference to other wines or foreign wines.

One man owns his vineyard, or buys his grapes grown in Texas and maufactures them into wines of various kinds and strengths, goes to a city and rents a store next to a saloon. Under the law he can sell without license or the payment of a tax. The State can grant this right if it desires to do so. Under the same law he is permitted to sell without bond. He can put up screens and can rent part of the premises he occupies to a gambler, sell or give wine, knowingly, to minors, students of institutions of learning and habitual drunkards, and to any other person he desires. He can permit minors to enter and remain in his saloon. He can permit games to be played upon the premises, which are prohibited by law. He can permit women to enter, drink and remain upon the premises. Can have music therein, with loud and boisterous noise. In fact, make a *gilded hell* of his place of business, but no penalty can be placed upon him under a bond. While the saloon keeper, the dealer in foreign wines or do-

mestic wines bought on the market, or spirituous and malt liquors made in Texas or elsewhere, for the doing of each of the above enumerated acts would incur, under the bond required of him, penalties aggregating one thousand dollars for each infraction thereof. So would a dealer in blackberry wine, or any other wine, except grape wines, though made in Texas, and in the hands of the producer or manufacturer thereof.

We ask the court, under what rule of classification can such legislation be sustained as consistent with equal protection of the laws, yet one class the law denominates criminals, the other selling vinous liquors, produced or made by them are not; yet the product sold by them produces the same effects when drunk to excess, but in the latter case the opportunities for vice are double without incurring any penalties of any character, under this section of the act. This is no police regulation, but is gross discrimination.

We think that further argument to establish the fact that this law is not a police regulation and does not bear upon all classes alike, and is therefore void, as violative of the Constitution of the United States, would be useless. But, if unconstitutional, then what would be its effect to do away with requiring bonds, or require dealers in domestic wines to give bonds? The rule is, that if different sections of an act are independent of each other, that which is unconstitutional may be disregarded and the valid sections may stand and be in force, but if the obnoxious sections are of such import that the other sections, without them, would cause results not contemplated by the legislature, then the entire statute relating to that obnoxious feature must fall.

Section 5060g of the act requires all persons, firms or associations of persons desiring to engage in the sale of spirituous, vinous and malt liquors or medicated bitters, to be drunk on the premises, to give bonds with security. If, then, section 5060i, exempting from its operation dealers in wines made from grapes grown in Texas, while in the hands of the maker or manufacturer, were held inoperative, that class would be included in those mentioned in Article 5060i, and be required to give bond and security, and would thereby incur penalties for the violation of its conditions when such was not the legislative intent. The statute, in this respect, it appears to us, must be regarded as an entity, and so much of it as relates to the giving of a bond and imposes fines and penalties recoverable under the bond for infraction of its conditions must be declared void.

In addition to the foregoing authorities, the Supreme Court of the State of Texas, in the case of the Pullman Palace Car Co. vs. State of Texas, 64 Tex., 275, decided by Justice Staten, which called in question a law of the State of Texas imposing upon every firm, person or association of persons owning or running any palace, sleeping or dining cars not owned by the railway company of Texas in this State an annual tax of two dollars per mile operated, in which the question arose as to the effect of an unconstitutional statute of the character named, held: That the legislature alone can impose taxes and determine what occupations shall be taxed, and when it imposes an occupation tax and expressly declares that persons or corporations shall not be subject to it, the courts have no power to declare that they shall, but they

have the power to declare that the act by which said discrimination is made is inoperative upon those upon whom the burden is attempted to be imposed and is violative of the rule requiring equality and uniformity.

The doctrine laid down in this case with reference to the effect of a law void because unconstitutional, is followed in the case of ex parte Overstreet, 39 Tex. Cr. App., 475; Ex parte Jones, 38 Tex. Cr. App., 458; Gustaffos vs. State, 40 Tex. Cr. App., 71; Rainey vs. State, 53 S. W. Rep., 882.

We now come to the question as to the effect of deciding the act void in so far as it requires the giving of a bond.

In this connection we would call the court's attention to the case of Giozza vs. Tiernan, 148 U. S., 657, in which the constitutionality of the act of this State in 1887, requiring the giving of a bond by liquor dealers selling in quantities of quarts or less, was called in question, and on appeal was heard in this honorable court, in which Chief Justice Fuller, in deciding the case, used the following language: "This statute affects all persons in Texas engaged in the sale of liquors in exactly the same manner and degree, whether considered as imposing restrictions upon the sale in the exercise of the police powers of the State or as levying taxes upon occupations under the authority of the legislature. In that behalf petitioner was not arbitrarily deprived of his property nor denied the equal protection of the laws."

The act under which this decision was made was repealed by Section 14 of the act of 1893, page 177, which repealed all laws and parts of laws in conflict therewith. Under the law of 1887, Revised Statutes of Texas, 1895,

section 3380, under which the above decision was given, bonds were only required to be given by dealers who sold in quantities less than a quart, whether to be drunk upon the premises or not, and the conditions of said bond were different in that he was not bound by the acts of his agent or employe, but bound only when sales or gifts were made by the owner of the business, and in that the exception on which we base our appeal was not contained in that act. The conditions of the former bond provided for in the act of 1887, which part of the law is as follows, to-wit:

"Any person, firm or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, shall, before engaging in such occupation, be required to enter into bond in the sum of five thousand dollars, with at least two good, lawful and sufficient sureties, payable to the State of Texas, to be approved by the county judge, conditioned that said person, firm or association of persons so selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in quantities less than a quart, shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication; and that he or they will not sell or permit to be sold in his or their house or place of business, nor give, nor permit to be given, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing through the sheriff or other peace of-

ficer, by the wife, mother, daughter or sister of the person not to sell to such person; and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that he or they will not permit any games prohibited by the laws to be played, dealt or exhibited in or about such house or place of business; and that he or they will not keep, or permit to be kept, for rpofit, amusement or other purposes, in or about his or their place of business any nine or ten-pin alley, pool table, bagatelle, pigeonhole or jenny-ling table, nor any other kind of table or device used for games of chance; and that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in quantities less than a quart, to any person or persons, for the purpose of running or conducting any game or games prohibited by the laws of this State; and that he or they will not adulterate in any manner, by mixing any drug with any intoxicating liquor of any kind; and that he or they will not knowingly sell or give away any impure or adulterated liquor of any kind."

We submit that the holding of Section 5060g, Revised Statutes, 1895, void in so far as the requirement of the bond and imposing penalties for the violation thereof is concerned, would not give any right to sustain the judgment rendered by the court upon a bond required by the statutes of 1887, as the bond required by the act of 1887 applies to a different class of persons engaged in the business than those embraced in the bond given under the law in question, which only applies to dealers selling gallons or

less to be drunk on the premises, and also contains conditions not embraced in the law of 1893, Article 5060g, R. S., 1895, which is before the court for construction and does not contain the exception complained of. This bond being a bond highly penal in its nature, should be strictly construed so far as it affects the principal and sureties in this case, and when construed strictly could not be held to apply to this case, and to sustain the judgment rendered upon the verdict of the jury imposing penalties upon the defendant and his sureties for three infractions of the bond, all the ofenses being for violating the same condition of the bond.

Under the foregoing views of the laws of the State, the case of Giozza vs. Tiernan, above referred to, would have no application except inferentially, and would only tend strongly, indeed, very strongly, to uphold the contention made by us under the second proposition that this law, so far as it requires the giving of the bond in question is concerned, and imposes penalties for the violation thereof, is void and of no effect, and that no recovery can be had upon a bond not given under Article 5060g, required by Article 411a of the Criminal Code, 1895.

CONCLUSION.

In presenting this case we are aware of the reluctance with which courts interfere with local statutes regulating the sale and use of spirituous liquors, the intemperate use of same is productive of great evils, and unless the statute under consideration is violative of the Constitution of the United States this court will not declare the act void. But when the legislature, acting under the Constitution,

recognizes, as it has done under the foregoing statute, spirituous, vinous and malt liquors as articles of lawful consumption and of commerce, then it is the duty of said legislature in passing laws regulating the sale of same to make same bear equally in its provision upon all parties within the limits of the State engaging in the business, and if in the opinion of this court, as was said in the case of Scott vs. Donald, "the statute is unconstitutional, then so long must continue the duty of the Federal Court to afford to such use and traffic in same the same measure of protection under the Constitution and laws of the United States as is given to any other legitimate business."

We respectfully submit to the court that the law in question should be held unconstitutional in so far as it attempts to impose unequal burdens, and that the bond required to be given thereunder is void, and that the judgment of the lower court should be reversed and the case dismissed.

F. E. Albright

Attorney for Plaintiffs in Error.

Of Counsel:

L. B. Croik

A. Lawrence Jr.

Geo. Sanford.

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Nos. 266, 267.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

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IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

Brief in Behalf of Plaintiffs in Error.

21

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IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

Brief in Behalf of Plaintiffs in Error.

STATEMENT.

The Federal question—Is the Texas statute regulating the business of liquor dealers unconstitutional because wines from grapes grown in that State while in the hands of producers or manufacturers are exempted from its general provisions?

No. 266 is an action by the State commenced in the District Court of Hamilton County, Texas, wherein judgment was rendered against Cox and his bondsmen for fifteen hundred dollars because of three infractions of a

liquor dealer's bond by permitting a minor to enter and remain in his saloon. (R. No. 266, pp. 1, 35, 36.)

No. 267 is an action on the same bond in the same court by the minor's father, in which he recovered three thousand dollars—a penalty of five hundred dollars for each of six infractions, three by selling the minor intoxicants and three by permitting him to enter and remain in the saloon where such drinks were sold. (R. No. 267, pp. 1, 35.)

Both cases arose out of the same facts and the records are so nearly identical that only one brief is necessary.

I will hereinafter consider specially case No. 266, and all references are to that record unless otherwise indicated.

The existing provisions of the Texas law regulating the sale of liquors were carried principally from the act of 1893 into Chapter One—A, Title CIV, Revised Civil Statutes of 1895, which was amended by Chapter 158, Laws of 1897. The act of 1893 and the act of 1897 are printed in full in the brief filed for the State (pp. 9–16). Chapter One—A, Rev. Stat. of 1895 and also the act of 1897 are printed in the brief of Mr. Albright and others for plaintiffs in error (pp. 19–31).

Originally Chapter One—A, Title CIV (Rev. Stat. 1895), contained nine articles—5060*a*, *b*, *c*, *d*, *e*, *f*, *g*, *h* and *i*. The act of 1897 amended Articles 5060*a* and 5060*c* to read as therein specified, and added Article 5060*j*, which applies only where local option exists and is unimportant here.

The following outline of the articles in Chapter One—A, as amended, indicates their relevancy to this controversy:

5060a—

Requires every person selling spirituous, vinous or malt liquors or medicated bitters to pay a specified annual tax on each separate establishment.

5060b—

Gives power to counties and incorporated towns to tax liquor dealers.

5060c—

Requires every person desiring to sell spirituous, vinous or malt liquors or bitters, first to file with the clerk of the county an application for license, under oath, designating place of business, quantities in which he proposes to sell—whether one gallon and more, or one gallon and less—and whether it is to be drunk on the premises. Also to pay the full annual tax and file bond required by Article 5060*g*.

5060d—

Provides for issuance of license after application is filed and taxes paid.

5060e—

No license shall be granted for more than a year, and shall authorize sales only at place specified.

5060f—

Provides for reports by clerks and collectors.

5060g—

Any person desiring to sell spirituous, vinous or malt liquors or intoxicating bitters, to be drunk on the premises, shall, before engaging in such sale, enter into a bond for $5,000 with sureties, payable to the State, with the following conditions:

That said person shall keep an open, quiet, and orderly place; that he will not sell, or permit to be sold, at his place, nor give, nor permit to be given, any spirituous, vinous or malt liquors or intoxicating bitters to any person under the age of twenty-one, or to a student of any institution of learning, or to an habitual drunkard, or to any person after having received a written prohibition from his wife, etc.; that he will not permit any person

under twenty-one to enter and remain in such place, nor permit any games prohibited by law in or about the place, or rent or let any part of the house for conducting any such game; that he will not adulterate liquors or knowingly sell any impure or adulterated.

The bond shall be recorded, and any one aggrieved by its breach may sue on it and be entitled to recover $500.00 as liquidated damages for each infraction until the full penalty is exhausted.

In addition to the civil proceedings by any injured one the county attorney, for its benefit, shall sue in the name of the State for $500.00 penalty for each infraction.

Whenever a bond has been or is about to be exhausted, a new one must be given before the dealer may continue the business.

One who sells without first giving bond is guilty of a misdemeanor.

An open, a quiet, and an orderly house are defined; a method is designated by which the surety may be released; and a provision is added exempting from recovery for sale to a minor, if made in good faith with well-grounded belief of his majority.

5060h—

Defines an habitual drunkard.

5060i—

"*The provisions of this chapter shall not apply to wines produced from grapes grown in this State while the same is in the hands of producers or manufacturers thereof.*"

5060j—

Applies only in localities where local option prevails.

Section 20, Art. 16, Constitution of Texas—

The legislature shall at its first session enact a law whereby the qualified voters of any county, justice's precinct, town, city (or such subdivision of a county as may be designated by the commissioners' court of

said county), may by a majority vote determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits.

A chapter of the Texas Revised Statutes is devoted to local option. Articles 3384 to 3399 make provision for adopting the same by counties, &c.

Certain provisions of the Penal Statutes which it may be desirable to consult are printed on pages 30 and 31 of the brief by Messrs. Albright and others for plaintiffs in error.

The complaint in substance alleges (R. 1–5)—

P. O. Cox is a citizen of Hamilton County, Texas, engaged in the business of a retail liquor dealer at Hico;

That in May, 1902, Cox made application for and procured a license to engage in the business of retailing spirituous, vinous and malt liquors, and bitters capable of producing intoxication;

That in order to procure the license and pursue such business, as required by law, he executed a bond for five thousand dollars, payable to the State of Texas, with the other plaintiffs in error as sureties;

That under the bond and license he was authorized to engage in the business of retailing spirituous, vinous and malt liquors, and medicated bitters;

That the bond was conditioned, among other things, that the principal would not sell, or permit to be sold, any spirituous, vinous, or malt liquors, or intoxicating bitters, to any person under the age of twenty-one years, nor to permit any such person to enter or remain in the house where the business was carried on;

That about May 30, 1902, one Thompson, under the age of twenty-one, six times entered and remained in the place of business of P. O. Cox and each time was sold and given spirituous, vinous and malt liquors and bitters;

That for each infraction of the bond the State is entitled

to recover five hundred dollars penalty, in all six thousand dollars, for which sum judgment is asked.

A demurrer was interposed setting up, among other things, that the act of the Legislature regulating the sale of liquor, under which suit was brought, is unconstitutional because Article 5060*i* exempts from its general provisions persons engaged in selling wines produced from grapes grown in the State of Texas. (R. 5, 6.)

The demurrer was overruled and the case tried to a jury, which found "three infractions of the bond for entering and remaining in said Cox's saloon," and assessed damages for fifteen hundred dollars in the aggregate. (R. 35, 36.) Judgment was entered accordingly.

Motion for new trial was duly filed wherein this reason, among others, was specified (R. 36):—The court erred in overruling defendant's demurrer relying on the invalidity of the act under which suit was brought because of the exemption from its provisions of persons engaged in the sale of wine produced from grapes grown in the State. Said act is unconstitutional and repugnant to the Fourteenth Amendment of the Federal Constitution, providing that no State shall deny to any person within its jurisdiction the equal protection of the law.

The motion was considered and denied, a bill of exceptions was settled, appeal taken to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, and errors were assigned. (R. 38, 39.) Among them is this—No. 14. The court erred in that it rendered judgment against the defendants on said bond, for that the law requiring the giving of the same is unconstitutional, being violative of section 1 of Article 14 of the United States Constitution, in that it is class legislation, and also Article 3 of the bill of rights of the State of Texas (R. 42).

The Court of Civil Appeals held there was no error and affirmed the judgment below. (R. 47.) In case No. 267 (R. 48) a written opinion specifically denied the contentions specified in the assignments based upon the Fourteenth Amendment. (85 S. W. Rep. 34.) No opinion was filed in 266.

The Court of Appeals overruled a motion for rehearing, wherein it is specifically stated "the court erred in holding that the court below did not err in rendering judgment against the defendants, appellants herein, on the bond sued on, for that the law requiring the giving of the same is unconstitutional, being violative of section 1, Article Fourteen, of the United States Constitution, in that it is class legislation." (R. 47, 52.)

Application for a writ of error to the Supreme Court of the State distinctly alleged that the Court of Civil Appeals erred in holding the fourteenth assignment of error was not well taken, and in holding that the court below did not err in rendering judgment against the defendants, appellants herein, on the bond sued on, for that the law requiring the giving of the same is unconstitutional, being violative of section 1, Article 14, of the Constitution of the United States, in that it is class legislation. R. 53 *et seq.*) This point was elaborated and pressed with earnestness.

The application was denied and the judgment of the Court of Civil Appeals became final without possibility of review by any higher State court. (R. 63.) A writ of error was sued out, errors assigned, and the case brought here.

ARGUMENT.

I.

The record presents a single question—Does exemption from the general provisions of the Texas statute regulating the liquor business, of wines produced from domestic grapes while in the hands of producers or manufacturers, render it obnoxious to the Fourteenth Amendment, which forbids denial of the equal protection of the laws? In order to prevail plaintiffs in error must establish an affirmative answer.

In *Doughit* v. *The State*—1904—(98 Texas, 344; 83 S. W. Rep. 795) the Supreme Court of Texas considered and denied the contention that the statute in question conflicts with the Fourteenth Amendment. It said—"We are unable to distinguish upon any sound principle the point from that ruled upon by the Supreme Court of the United States in the case of *The American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89." The State courts followed Doughit's case in the causes now under consideration.

Counsel for the State maintain that the brief heretofore filed in behalf of plaintiffs in error admits the taxation features of the statute are good, and, therefore, they proceed to argue the whole enactment is valid. (Br. 6, 21, 26.) I distinctly disclaim any such admission and submit that the language (quoted by opponents in part) in the brief of my associates does not warrant the argument or justify the suggested conclusion.

Intoxicating liquors are recognized by the constitution and laws of Texas as legitimate articles of commerce.

In *Scott* v. *Donald*, (165 U. S. 58, 91,) this court declared:

> So long, however, as State legislation continues to recognize wines, beer, and spirituous liquors as articles

of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles. [See also *Leisy* v. *Hardin*, 135 U. S. 100.]

The Fourteenth Amendment provides—'No State shall deny to any person within its jurisdiction the equal protection of the laws.'

Those who in Texas are engaged in the liquor traffic are as fully guaranteed against denial of the equal protection of the laws by the State as are persons in any other business, *e. g.*, dealers in flour or dry goods. And every one of them has the constitutional right to buy and sell liquors subject to the same restrictions, and no others, prescribed for other dealers in the same character of merchandise under like circumstances.

The intoxicating quality of alcoholic liquors causes traffic therein to be attended by peculiar evils, and in order to mitigate these the State has the right, discriminating between liquor merchants and all others, to subject the former to appropriate, reasonable, special and stringent regulations. The peculiar object to be attained (greater sobriety) justifies a discrimination which may tend to effectuate it, but when that object is not really present the power so to discriminate does not exist. (*Mugler* v. *Kansas*, 123 U. S. 623, 661.) If to lessen intoxication it is proper to prescribe different treatment for classes of wine merchants, *e. g.*, wholesalers and retailers, the State may do so, but the occasion therefor in furtherance of the fundamental purpose must appear. The class restrictions must find warrant in the evil to be met and apply equally and impartially to all similarly situated—difference in treatment is unwarranted unless conditions are substantially dissimilar. The same general principle would govern in respect of laws concerning the sale of

any dangerous article—liquors, gunpowder or kerosene. It follows if one may sell intoxicants without license and without civil responsibility, all under like conditions may do the same thing, and the like conditions must have relation to the evils calling for correction.

The statutes of Texas permit the producer or manufacturer of intoxicating wines from grapes of the State to sell them without license, without bond, and without tax, where he will and in such quantities as he may desire, to be drunk on the premises. But if one not a producer or manufacturer desires to sell Texas wines or any other liquors, *e. g.*, California wines, he must procure a license, pay a heavy tax, and give bond with onerous condition, for an infraction of which he is liable to two suits with recovery in each of five hundred dollars.

I submit the State, without adequate reason therefor, has attempted to give a special privilege and exemption to producers and manufacturers of domestic grape wines (other domestic wines are not privileged), and has thereby denied the equal protection of the laws to all others engaged in like traffic. The distinction is not justified by the reason which must support the harsh restrictions imposed generally on liquor dealers—the necessity of mitigating the evils of intoxication; nor does it aid in enforcing the law in an administrative way or otherwise. Texas grape wines are not innocuous because peddled out by a manufacturer, and are no less deleterious to health and morals than similar wines from other States. To permit their unrestricted sale tends rather to defeat than to aid the purpose which must be relied on to support the general provisions of the law.

Much more than taxation is involved in the statute in question. Arbitrarily and without adequate reason it puts burdensome restrictions on certain dealers not imposed upon others who sell the same character of merchandise. It has entered the domain of trade and commerce

and arbitrarily discriminated against some by declaring that particular classes should be exempt from the operation of a statute denouncing as criminal certain things connected therewith.

It requires no argument to show the State could not, in a pure revenue measure, require dealers in foreign wines to pay a tax and operate under stringent regulations while exempting therefrom persons engaged in selling domestic wines. Revenue laws may sometimes properly discriminate between producers and dealers, but there must always be therefor some clear and adequate reason. A burden or restriction imposed upon one and not applicable to all, in order to be valid "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." (*Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155.)

Why should a manufacturer of wines from Texas grapes, however intoxicating, be permitted to set up a saloon in Hico (500 miles from the place of manufacture) and retail it without license, without tax, without bond, and without civil responsibility, when the man next door may not sell the same wines or any other kind of wines—even less harmful and intoxicating ones—without being heavily taxed and subjected to the most onerous responsibility?

The special burdens and impediments which the statutes throw about the liquor traffic must find warrant in the purpose to curtail the evils produced by the intoxicating quality of the article sold. That is the thing which justifies the discrimination between those who deal therein and all other merchants. The equal protection of the laws is accordingly denied when something burdensome is demanded of one seller of intoxicants and not

required of another who deals in the self-same stuff under like circumstances. Because one has raised the grapes or manufactured the wine from them does not render drinking them less intoxicating nor make his place where the same are disposed of by the drink harmless to the community. Intoxication is not relieved of evil effects because the liquor producing it originated in Texas.

II.

In support of the contention for plaintiffs in error we rely on *Connolly* v. *Union Sewer Pipe Company*, (184 U. S. 540, 546 *et seq.*) That case, recently decided, contains an exhaustive review of authorities and thorough discussion of the principles applicable here.

The Illinois statute in general words declared unlawful combinations to restrict trade, limit production, increase or fix prices, prevent competition, pool interests, &c., but declared—"The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." It was challenged as obnoxious to the equal protection clause of the Fourteenth Amendment, in that it permitted agriculturalists and stock raisers to do with impunity what would be criminal if undertaken by others; and this court held the enactment utterly void. Mr. Justice Harlan, speaking for the court, said:

> (p. 556.) Looking specially at its provisions, it will be seen that, so far as the statute is concerned, two or more agriculturalists or two or more live stock raisers may, in respect of their products or live stock in hand, combine their capital, skill or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock; or limiting, increasing or reducing their price; or preventing competition in their sale or purchase; or fixing a standard or figure whereby the price thereof to the

public may be controlled; or making contracts whereby they would become bound not to sell or dispose of such agricultural products or live stock below a common standard figure or card or list price; or establishing the price of such products or stock in hand, so as to preclude free and unrestricted competition among themselves or others; or by agreeing to pool, combine or unite any interest they may have in connection with the sale or transportation of their products or live stock that the price might be affected. All this, so far as the statute is concerned, may be done by agriculturalists or live stock raisers in Illinois without subjecting them to the fine imposed by the statute. But exactly the same things, if done by two or more persons, firms, corporations or associations of persons, who shall have combined their capital, skill or acts, in respect of their property, merchandise or commodities held for sale or exchange, is made by the statute a public offence. * * * Is not this such discrimination against those engaged in business (other than the sale of agricultural products and live stock in the hands of producers and raisers) as is forbidden by that clause of the Fourteenth Amendment which declares that "no State shall * * * deny to any person within its jurisdiction the equal protection of the laws?"

(p. 558.) What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the States will show. It is sometimes difficult to show that a State enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guarantee of the equal protection of the laws means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances." *Missouri* v. *Lewis*, 101 U. S. 22, 31. We have also said: "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction

the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences." *Barbier* v. *Connolly*, 113 U. S. 27, 31. This language was cited with approval in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, in which it was also said that "the equal protection of the laws is a pledge of the protection of equal laws." In *Hayes* v. *Missouri*, 120 U. S. 68, 71, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, "shall be treated alike, under like circumstances and considerations, both in the privileges conferred and in the limitations imposed." "Due process of law and the equal protection of the laws," this court has said, "are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." *Duncan* v. *Missouri*, 152 U. S. 377, 382. Many other cases in this court are to the like effect.

After referring to *Magoun* v. *Illinois Trust & Savings Bank*, (170 U. S. 283,) and *American Sugar Refining Company* v. *Louisiana*, (179 U. S. 89,) the Justice further said:

(p. 562.) The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involved considerations that could not, in the nature of things, apply to a State enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. * * * A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and, at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domes-

tic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.

Looking specially at the Texas statute it will be seen that the producer or manufacturer of wines from Texas grapes may sell them in such quantities and in such place as he desires, without license, without tax, without giving bond not to sell to minors, to keep an orderly house, &c., and without the extraordinary liability which an infraction of such bond entails. But exactly the same thing cannot be done without criminal liability by any other man in respect of his property of the self-same kind, as, *e. g.*, Texas wines purchased by him from the producer or manufacturer, or California wines perhaps less intoxicating.

The exemption in the Illinois statute rendered it null, and I submit the same reasoning which led to that result requires a like conclusion as to the act under consideration.

The Texas courts in support of their conclusion upholding the statute referred to the ruling in *American Sugar Refining Company* v. *Louisiana* (179 U. S. 89), but the case seems clearly inapplicable when read in the light of the comments upon it quoted above.

The recent case (April 16, 1906)—*Frederick St. John* v. *The People*—opinion by Mr. Justice McKenna—follows the well-settled rule that different treatment may be accorded to those dissimilarly situated. The statute in question therein discriminated between producers and non-producers of milk as to its sale when below standard, and was upheld. The court said—"Not only the final purpose of the law must be considered, but the means of its administration—the ways it may be defeated," and held

that the challenged classification was a proper one for administrative reasons, being useful in the proper enforcement of the fundamental purpose of the enactment and in preventing evasions otherwise difficult, perhaps impossible, to detect.

In the present case no such administrative necessity is present, and it certainly does not seem to be an especial aid in mitigating the evils attending the sale of intoxicants to permit producers and manufacturers of domestic grape wines to do as they please with it.

Tiernan v. *Rinker*, (102 U. S. 123,) is cited by the State in support of the proposition that as plaintiff in error Cox was engaged in selling other liquors besides wines he is not in position to challenge the validity of the statute.

The point at issue in Tiernan's case was the constitutionality of a Texas revenue act which imposed a license tax upon dealers in spirituous, vinous or malt liquors, but exempted therefrom beers and wines produced in the State. The act was challenged as in violation of the commerce clause of the Constitution, and the court held it could not be enforced against one who sold only foreign beer or wine because of the exemption, but could be as to one who sold whiskey. Petitioners expressly alleged in their injunction bill that they were engaged in the "occupation of selling spirituous, vinous, malt and other intoxicating liquors." The provisions of the statute were severable.

In the present case we maintain that the statute is wholly bad because it denies the equal protection of the laws to persons within the jurisdiction of the State. Dealers in domestic wines and other similar articles wholly subject to the State's authority receive different treatment without adequate reason, and such manifestly

was the expressed intention of the Legislature. This feature of the law cannot be eradicated and the whole must fail.

I respectfully ask that the statute be declared invalid and that the action of the State court be reversed.

J. C. McREYNOLDS,
Counsel for Plaintiffs in Error.

APRIL, 1906.

FILE COPY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

No. 266.

P. O. COX, SAM LEVY AND W. M. EVANS,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF DEFENDANT IN ERROR, THE STATE OF TEXAS.

Charles K. Bell
R. V. DAVIDSON,
Attorney General of Texas;
CLAUDE POLLARD,
Office Assistant Attorney General of Texas,
For Defendant in Error.

THE STATE PRINTING CO., AUSTIN, TEXAS.

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IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a suit for the recovery of statutory penalties for breach of a liquor dealer's bond. The plaintiff in error P. O. Cox is the principal in the bond, and the other plaintiffs in error are the sureties. The petition charges that the plaintiff in error P. O. Cox breached the bond by permitting W. W. Thompson, a minor, to enter and remain in his saloon on six different, distinct and separate occasions, and by selling and giving, and permitting to be sold and given to said W. W. Thompson, in said saloon, spirituous, vinous and malt liquors, and medicated bitters. (Tr., p. 4.)

The verdict was rendered and judgment given against plaintiffs in error for three infractions of the bond for allowing said minor

to enter and remain in said saloon in the sum of $500.00 each, aggregating $1,500.00 (Tr., p. 35.)

The plaintiffs in error, being defendants in the trial court, answered by general and special demurrer, attacking the constitutionality of the Act giving the right of action in favor of the State on the ground that the Act exempted from its provisions people engaged in the same business. (Tr., p. 5.)

The demurrers were overruld by the court and the case went to trial upon its merits, resulting in a judgment as above stated. Plaintiffs in error filed a motion for a new trial, which was overruled. (Tr., p. 38.)

The case was taken on appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, and the judgment of the lower court was affirmed. (Tr., p. 47.)

A motion for rehearing was filed in the Court of Civil Appeals, which was overruled. (Tr., p. 52.)

An application for writ of error was made to the Supreme Court of the State, which was refused, (Tr., p. 63), and the case comes by writ of error to this court for review upon the questions raised, that the Act is unconstitutional and violative of the Fourteenth Amendment to the Constitution of the United States in that it denies to plaintiff in error the equal protection of the laws.

Plaintiff in error P. O. Cox, on the 22nd day of May, 1902, made application for license to sell spirituous, vinous or malt liquors, or medicated bitters in quantities of one gallon or less to be drunk on the premises in compliance with Article 5060c, Revised Statutes of 1895, of the State of Texas. (Tr., p. 8.)

Plaintiff in error P. O. Cox entered into bond with plaintiffs in error Sam Levy and W. M. Evans, as sureties, in compliance with the provisions of Article 5060g, Revised Statutes of Texas, 1895. (Tr., p. 9.)

The constitutional questions raised here were decided by the Court of Civil Appeals for the Third Supreme Judicial District of this State adversely to the contention of plaintiffs in error. (Cox v. State, 85 S. W. Rep., 1199; Cox v. Thompson, 85 S. W. Rep., 34.)

The assignments of error relied upon by plaintiffs in error in this court are as follows:

FIFTH ASSIGNMENT OF ERROR.

The court erred in holding that the provisions of said Act do not

cast special burdens upon those engaged in the sale of wine manufactured from grapes, or other fruits, or of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, not cast on those engaged in the sale of wine manufactured from grapes grown in Texas while in the hands of the producers or manufactureres thereof.

SEVENTH ASSIGNMENT OF ERROR.

The court erred in holding that said Act does not grant special and exclusive privileges to certain citizens which it denies to plaintiffs in error, and to other citizens in the State.

FOURTH ASSIGNMENT OF ERROR.

The court erred in holding that the provisions of said Act and the amendments thereto do not unlawfully discriminate between those engaged in selling spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, or in the selling of wines manufactured from other fruits and grapes, or in the selling of wines manufactured from grapes grown in Texas while not in the hands of manufacturers or producers thereof, as contradistinguished from those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof, which latter class is exempt from giving bonds and from incurring penalties for violating the conditions thereof as provided for in said Act. (Tr., p. 76; brief of plaintiffs in error, page 8.)

BRIEF.

First Counter Proposition Under the Fifth, Seventh and Fourth Assignments of Error of Plaintiffs in Error.

1.

THERE IS NO INHERENT RIGHT IN A CITIZEN TO SELL INTOXICATING LIQUORS. IT IS NOT A PRIVILEGE OF A CITIZEN OF A STATE, OR OF A CITIZEN OF THE UNITED STATES WHICH THE STATES ARE FORBIDDEN

TO ABRIDGE. IT IS A RIGHT EXERCISABLE ONLY SUBJECT TO THE POLICE POWERS OF THE STATE.

STATEMENT.

Revised Statutes of Texas of 1895:

"Art. 5060c. PREREQUISITES TO THE ISSUE OF LICENSE TO SELL. Every person, firm, corporation, or association of persons, desiring to engage in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in this State, as set forth in Article 5060a of this Chapter, shall, before commencing the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell the same, an application, under oath, on forms provided by the Comptroller, and shall designate the place in which it is proposed to engage in the sale of such liquors or medicated bitters, if (in) any city or town in which streets are named and houses numbered, the street and number of house shall be given, and the quantities in which he or they propose to sell, whether one gallon or more, or one gallon and less than a gallon, or whether they desire to sell malt liquors exclusively."

Plaintiff in error P. O. Cox made application for license under the provisions of this Article. (Tr., p. 8.)

"Art. 5060g. LICENSEE TO EXECUTE BOND; CONDITIONS OF BOND, ETC. Any person, firm or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, to be drunk on the premises, shall, before engaging in such sale, be required to enter into bond in the sum of five thousand dollars; provided, however, that any person, firm or corporation of persons dealing exclusively in malt liquors shall be required to give bond only in the sum of one thousand dollars, with at least two good, lawful and sufficient sureties, payable to the State of Texas, to be approved by the county judge, conditioned that said person, firm, or association of persons so selling spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, shall keep an open, quiet, and orderly house, or place for the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication; and that such person, firm or association of persons, or his or their agent or employe, will not sell nor permit to be sold in his or their

house or place of business, nor give nor permit to be given, any spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, daughter, or sister of the person, not to sell to such person; and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that he or they will not permit any games prohibited by the laws of this State to be played, dealt, or exhibited in or about such house or place of business; and that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this State; and that he or they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug; and that he or they will not knowingly sell or give away any impure or adulterated liquors of any kind." * * *

Plaintiffs in error gave bond under the provisions of this Article. (Tr., p. 9.)

AUTHORITIES.

Beer Co. v. Massachusetts, 97 U. S., 25.
Battemeyer v. Louisiana, 18 Wall., 129.
Mugler v. Kansas, 123 U. S., 659.
Foster v. Kansas, 112 U. S., 206.
Norton v. Jamison, 151 U. S., 591.
Crowley v. Christensen, 137 U. S., 86.
Giozza v. Tiernan, 148 U. S., 657.
Kidd v. Pearson, 128 U. S., 1.

ARGUMENT.

The caption of the Act under which this suit was brought is as follows:

"An Act to *regulate* the sale of spirituous, vinous or malt liquors, or medicated bitters; to fix a *tax* upon all persons or associations of

persons selling such liquors; to define the time and manner of *collecting such tax;* to fix *penalties* for the violation of this Act, and to repeal all laws and parts of laws in conflict with the provisions of this Act." (Acts of Leg. of 1893, p. 177.)

Counsel for plaintiffs in error have made the following concession:

"Now we do not contend that this Act is void as to the features contained in it with reference to taxation, * * * but we do contend that the Act in so far as it prescribes regulations, amongst others, to wit, the giving of the bond sued on, is void." (Brief, p. 36.)

If the taxing features of the Act are not repugnant to the Fourteenth Amendment to the Constitution of the United States, neither are the police regulations, contained in the Act, violative of that amendment. This court has expressly held that "the police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter." (Kidd v. Pearson, 128 U. S., 26.)

We direct the court's attention to the following cases:

BARTHEMEYER V. IOWA.

(18 Wall., 129.)

"But the most liberal advocate of the rights conferred by that amendment have contended for nothing more than that the rights of the citizen previously existing, and dependent wholly on State laws for their recognition, are now placed under the protection of the Federal Government, and are secured by the Federal Constitution. The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of Wynehamer v. The People, has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a State or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far

as such a right exists, is not one of the rights growing out of citizenship of the United States.

GIOZZA V. TIERNAN.

(148 U. S., 657.)

"Irrespective of the operation of the Federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of a Legislature of a State, except those imposed by its written Constitution. There is nothing in the Constitution of Texas restricting the power of the Legislature in reference to the sale of liquor, and it is well settled that the Legislature of that State has the power to regulate the mode and manner and the circumstances under which the liquor traffic may be conducted, and to surround the right to pursue it with such conditions, restrictions and limitations as the Legislature may deem proper. Ex parte Bell, 24 Texas App., 128; Bell v. State, 28 Texas App., 96. In these cases and in the case before us, the law in question was held to be within the legislative power; and, so far as the State Constitution is concerned, that conclusion is not re-examinable here. But it is contended that the Act conflicts with the provisions of the Fourteenth Amendment, that, 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall and State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. Bartemeyer v. Iowa, 18 Wall., 129."

CROWLEY V. CHRISTENSEN.

(137 U. S., 86.)

"It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under

such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy and dispose of property is declared in the constitutions of several States to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any State from passing laws respecting the acquisition, enjoyment any disposition of property."

And again the court in the same case says:

"It is urged that, as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted, and is confined to the party offending; their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation.

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement, which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of a saloon before a glass of his liquors can be thus disposed of, but

restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business—to mitigate its evils or suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils."

2.

TITLE CIV, CHAPTER 1-A, REVISED STATUTES OF THE STATE OF TEXAS OF 1895, AND THE AMENDMENT THERETO, BY THE ACT OF 1897, ARE NOT REPUGNANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT.

The statutes under which this suit was brought consist of the Act of 1893, and the amendment thereto of 1897.

The Act of 1893 in full is as follows:

LIQUORS—SALE OF REGULATED—TAXATION.

CHAP. 121.—(H. B. No. 91.) An act to regulate the sale of spirituous, vinous, or malt liquors, or medicated bitters; to fix a tax upon all persons or associations of persons selling such liquors; to define the time and manner of collecting such tax; to fix penalties for the violation of this act, and to repeal all laws and parts of laws in conflict with the provisions of this act.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*: That hereafter there shall be collected from every person, firm or association of persons selling spirituous, vinous, or malt liquors, or medicated bitters, within this State, an annual tax on each separate establishment as follows: For selling spirituous,

vinous, or malt liquors in quantities of one gallon or less than one gallon, three hundred dollars; for selling such liquors in quantities of one gallon or more than one gallon, three hundred dollars; Provided, that in selling one gallon, the same may be made up of different liquors in unbroken packages, aggregating not less than one gallon. For selling malt liquors exclusively, fifty dollars: Provided, that nothing in this section shall be so construed as to exempt druggists who sell spirituous, vinous, or malt liquors, or medicated bitters, on the prescription of a physician, or otherwise, from the payment of the tax herein imposed: Provided further, that this section shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous, or malt liquors are used, and which compounds are not intoxicating beverages prepared in evasion of the provisions of this act.

SEC. 2. That the commissioners court of the several counties in this State shall have the power to levy and collect from every person or association of persons selling spirituous, vinous, or malt liquors, or medicated bitters, a tax equal to one-half the State tax herein levied; and where any such sale is made in any incorporated city or town, such city or town shall have the power to levy and collect a tax upon such sale equal to that levied by the commissioners court of the county in which such city or town is situated.

SEC. 3. That every person, firm, or association of persons desiring to engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters, shall, before he or they commence the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell such spirituous, vinous, or malt liquors, or medicated bitters, an application for license to engage in the sale of such liquors or medicated bitters. Said application shall be made on oath, on forms to be provided by the Comptroller, and shall designate the place at which it is proposed to carry on the sale of such liquors or medicated bitters; if in a city, the street and number of the house shall be given and the quantities in which he or they propose to sell, whether one gallon or more than one gallon, or one gallon and less than one gallon, or whether they desire to sell malt liquors exclusively; and shall also state in said application whether or not the said liquors are to be sold to be drunk on the premises; and shall pay

to the collector of taxes of the county in which he or they propose to sell such spirituous, vinous, or malt liquors, or medicated bitters, the entire annual tax herein levied, according to the quantities in which he or they propose to sell, and the entire annual tax upon such business, as may be levied by the commissioners court of such county, and file with the county clerk bond as required in section nine of this act. In case the selling of such liquors or medicated bitters be carried on in a city or incorporated town, he or they so selling shall, in addition to the State and county tax herein required to be paid, pay to collector of taxes in such city or town such tax as may be levied on said business by such city or town, and all taxes herein levied shall be paid in advance. All licenses issued under the provisions of this act shall be posted by the licensee in a conspicuous place in his or their place of business, and on failure to so post such license, he or they so failing shall be considered as having no license.

SEC. 4. That upon filing the sworn application as provided in section 3, and paying to the collector the annual State and county tax herein provided for, and filing such bond as is required by section 9, the county clerk of said county shall issue to said applicant a license to sell spirituous, vinous, or malt liquors, or medicated bitters, at the place and in the manner and quantities set forth in the application, and no sale shall be made until such license is procured. The receipt of the tax collector shall be evidence of the payment of the tax. For issuing licenses herein provided for, county clerks shall be entitled to charge a fee of twenty-five cents for each license.

SEC. 5. That no license shall be granted for a longer or shorter period than one year. The particular place and house in which the liquors are to be sold shall be designated in the license, and no license shall authorize any person to sell spirituous, vinous, or malt liquors, or medicated bitters, at any other place or house than that designated in the license: Provided, that if any person or association of persons having a license to sell such liquors, desires to change his or their place of business, such change may be made by presenting the license to the clerk of the county and having the new place of business inserted therein, but in no case to admit of the temporary closing of one place of business to sell at another place.

SEC. 6. That any person or association of persons who shall

engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters, without having obtained license therefor, shall be fined any sum not less than the amount of the taxes so due and not more than double that sum, or imprisoned in the county jail from ten to ninety days, in the discretion of the jury. And any person or persons who shall sell spirituous, vinous, or malt liquors, or medicated bitters, in quantities not authorized by his or their license, or who shall sell in any other place than that designated in the license, or who shall sell otherwise than authorized by the license, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum from fifty to one hundred dollars, or imprisoned in the county jail from ten to thirty days, in the discretion of the jury: Provided, that each day any person, firm, or association of persons, in his or their employ, shall engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters, in violation of this act shall constitute a separate offense.

SEC. 7. That the payment of the United States special tax as a seller of spirituous, vinous, or malt liquors shall be held to be prima facie evidence that the person or persons paying such tax are engaged in selling such liquors.

SEC. 8. That the county clerk in each and every county in this State shall, between the first and tenth day in each month, forward to the State revenue agent a sworn statement, giving the names of all persons who have filed applications for license during the preceding month, and the tax collector of each county shall keep a register in which shall be entered the names of all persons paying taxes under this act, with the date of payment, and shall, between the first and tenth day of each month, make to the State revenue agent a sworn report, giving the names of all persons who have paid a liquor tax during the preceding month, and the character of tax paid by each. The reports provided for in this section shall be made upon blank forms to be furnished by the Comptroller.

SEC. 9. That any person, firm, or association of persons desiring to engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, to be drunk on the premises, shall, before engaging in such sale, be required to enter into bond in the sum of five thousand dollars: Provided, however, that any person, firm, or corporation of persons dealing exclusively in malt liquors shall be required to give bond only in

the sum of one thousand dollars, with at least two good, lawful, and sufficient sureties, payable to the State of Texas, to be approved by the county judge, conditioned that said person, firm, or association of persons so selling spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, shall keep an open, quiet, and orderly house or place for the sale of spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication; and that such person, firm, or association of persons, or his or their agent or employe, will not sell nor permit to be sold in his or their house or place of business, nor give nor permit to be given, any spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, daughter, or sister of the person, not to sell to such person; and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that he or they will not permit any games prohibited by the laws of this State to be played, dealt, or exhibited in or about such house or place of business; and that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell spirituous, vinous, or malt liquors, or medicated bitters capable or producing intoxication, in any quantity, to be drunk on the premises, to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this State; and that he or they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug; and that he or they will not knowingly sell or give away any impure or adulterated liquors of any kind; which said bond shall be filed in the office of the county clerk of the county where the business is conducted, and shall be recorded by such clerk in a book to be kept for such purpose, for which service the said clerk shall be entitled to a fee of seventy-five cents; which said bond may be sued on at the instance of any person or persons aggrieved by the violation of its provisions, and such persons shall be entitled to recover the sum of five hundred dollars as liquidated damages for each infraction of the condition of such bond, and the said bond shall not be void on the first re-

covery, but may be sued on until the full penal sum named therein shall have been recovered. In addition to civil proceedings for individual injuries, brought on said bond as above indicated, if any person, firm, or association of persons shall violate any of the conditions of the bond herein required, it shall be the duty of the county and district attorneys, or either of them, to institute suit thereupon in the name of the State of Texas, for the use and benefit of the county, and the amount of five hundred dollars as a penalty shall be recovered from the principals and sureties upon a breach of any of the conditions thereof; and whenever the first or subsequent bond as required is exhausted by suit at the instance of individuals, or for the use of the county, a new similar bond shall be given and approved before the dealer shall have the right to further pursue the business of a liquor seller; or, in case suit is pending on any such bond, and the county or district attorney shall make and file an affidavit with the clerk of the county court that he believes the bond of the defendant will be exhausted by said suit, the clerk shall at once notify the liquor dealer thereof, and it shall be the duty of the liquor dealer, within twenty days from the time the bond is exhausted, or, in other event, within twenty days from the time the notice is given, to give a new bond similar to the bond first given, to be approved in the same way; and until such new bond is given and approved, when it is required by this act, the liquor seller shall not have the right to further pursue the business of selling liquors; and any person, firm, or association of persons who shall sell liquors, in any quantity, to be drunk on the premises, without giving the first bond, or the new bond, as required by this act, shall be deemed guilty of a misdemeanor, and on conviction shall be fined the same amount provided for in cases where no license has been obtained. An open house, in the meaning of this act, is one in which no screen or other device is used or placed either inside or outside of such house or place of business for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where intoxicating liquors are sold to be drunk on the premises. A quiet house or place of business, in the meaning of this act, is one in which no music, loud or boisterous talking, yelling, or indecent or vulgar language is allowed, used, or practiced, or any other place calculated to disturb or annoy any persons residing or doing business in the vicinity of such house or place of business, or those

passing along the streets or public highways. By an orderly house is meant one in which no prostitute or lewd woman or women are allowed to enter or remain: And it is further provided, that said house must not contain any vulgar or obscene pictures. Any surety on such bond may relieve himself from further liability thereon by giving the principal in said bond notice in writing that he will no longer remain as surety on said bond and by filing with the county judge an affidavit that such notice has been given, and if within five days after such notice if he fail to make a new bond, he shall cease to pursue said business until a new bond is given. And any person who shall continue to pursue said business after such affidavit is filed shall be guilty of a misdemeanor, and shall be punished as provided in cases where no license has been procured: Provided, that where the sale is made in good faith, with the belief that the minor was of age, and there is good ground for such belief, that shall be a valid defense to any recovery on such bond.

SEC. 10. That any tax collector, sheriff, deputy sheriff, constable, or other peace officer, having knowledge of the violation of this act, shall report the same to the county attorney, who shall forthwith prosecute any person or persons violating the provisions of this act; and any tax collector whose attention has been called to an instance in which the provisions of this act appear to have been violated, shall investigate the particular case, and if it is found this act has been violated, report the fact to the county attorney or district attorney.

SEC. 11. That any officer who shall willfully refuse or neglect to perform the duties required of him by the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum from one hundred to five hundred dollars, and may be dismissed from office.

SEC. 12. That all receipts issued by tax collectors for taxes paid under this act shall be made on blanks prepared by the Comptroller, and any tax collector who shall issue a manuscript receipt for taxes herein levied, or use any form of receipt other than that furnished him by the Comptroller, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished as provided in section 11 of this act.

SEC. 13. An habitual drunkard, within the meaning of this act, is one who makes it a habit, or who habitually becomes intox-

icated by the voluntary use of intoxicating liquors; and in all suits for the breach of such bond for unlawfully selling to an habitual drunkard, the question whether or not such person is an habitual drunkard shall be determined by the court or jury trying such case, as any other fact.

SEC. 13a. The provisions of this act shall not apply to wines produced from grapes grown in this State, while the same is in the hands of the producers or manufacturers thereof.

SEC. 14. All laws and parts of laws in conflict herewith are hereby repealed.

SEC. 15. The evils designed to be remedied by this act creates an emergency and an imperative public necessity for the act to take effect and be in force from and after its passage; and the fact that the Comptroller of Public Accounts is required to send out his blanks by the first day of May, creates an imperative public necessity that this act take effect at once, and it is therefore enacted that this act shall take effect and be in force from and after its passage.

The Act of 1897 in full is as follows:

H. B. No. 686.] CHAPTER 158.

An Act to amend the law in regard to taxation, and to regulate the sale of Liquor, by amending Article 5060a and Article 5060c, of Title 104, Chapter 1a. of the Revised Civil Statutes of Texas, and adding Article 5060j to said chapter.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*: That Articles 5060a and 5060c, of the Revised Civil Statutes of Texas, as described in the caption to this act, be amended so as to hereafter read as follows; and that Article 5060j be added to said chapter, to read as herein expressed:

Article 5060a. Hereafter there shall be collected from every person, firm corporation, or association of persons, selling spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in this State, not located in any county, subdivision of a county, justice precinct, city or town, where local option is in force under the laws of Texas, an annual tax of $300 on each separate establishment, as follows: For selling such liquors or medicated bitters, in quantities of one gallon or less than one

gallon, $300; for selling such liquors or medicated bitters in quantities of one gallon or more than one gallon, $300; provided, that in selling one gallon the same may be made up of different liquors in unbroken packages aggregating not less than one gallon; for selling malt liquors exclusively, $50. And there shall be collected from every person, firm, corporation, or association of persons, for every separate establishment selling such liquors or medicated bitters within this State and located within a county, subdivision of a county, justice precinct, town or city, in which local option is in force under the laws, the sum of $200; provided, the same shall not be sold in such locality except on prescription and in compliance with the laws governing sales in such localities; provided, further, that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, on the prescription of a physician or otherwise in either locality as above set forth from the payment of the tax herein imposed; provided, further, that this article shall not apply to the sale by druggists of tinctures and drug compounds, in the preparation of which such liquors or medicated bitters are used and sold on the prescription of a physician or otherwise, and which tinctures and compounds are not intoxicating beverages prepared in the evasion of the provisons of this chapter nor the local option law.

Article 5060c. Every person, firm, corporation, or association of persons, desiring to engage in the sale of spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, in this State, as set forth in Article 5060a of this chapter, shall, before commencing the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell the same, an application under oath, on forms provided by the Comptroller, and shall designate the place in which it is proposed to engage in the sale of such liquors or medicated bitters, if any city or town in which streets are named and houses numbered, the street and number of house shall be given, and the quantities in which he or they propose to sell, whether one gallon or more, or one gallon and less than a gallon, or whether they desire to sell malt liquors exclusively; provided, in localities where local option is in force not more than one quart shall be sold at one time to the same person; and shall also state in said application whether said liquors or medicated

bitters are to be sold to be drunk on the premises, or to be sold on prescription in a local option county, subdivision of a county, justice precinct, town or city; and shall pay to the collector of taxes of the county in which such sales are to be made the full amount of the annual tax herein levied, and such as may be levied by the commissioners' court of such county and the city or town in which sales are to be made; and shall file with the said clerk a bond as required by Article 5060g and 5060j of this chapter. In case the sales are to be made in a city or incorporated town, the taxes by such city or town shall be paid to the collector of taxes of such city or town. All taxes herein levied or which may be levied by a county, city or town, shall be paid in advance, and upon the payment of same and full compliance herewith, the county clerk of the county shall issue to the person, firm, corporation, or association of persons, a license as provided for in Article 5060j of this chapter, which said license and licenses or receipts for the tax or revenues issued by the United States shall be posted by licensee in a conspicuous place in his or their place of business, and on failure to so post such license or receipt, he or they so failing shall be considered as having no license and subject to all the pains and penalties as if no such license had issued.

Article 5060j. Every person, firm, corporation, or association of persons, before engaging in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in any county, subdivision of a county, justice precinct, town or city in which local option is in force, shall enter into bond in the sum of $2500, with at least two good and sufficient sureties, payable to the State of Texas, to be approved by the county judge of the county in which such sales are to be made, conditioned that said person, firm, corporation, or association of persons, so selling spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, shall not sell in any quantity, except on the prescription of a regular practicing physician, addressed to such person, firm, corporation, or association of persons, written with ink on white paper in the handwriting of such physician, dated numbered, and signed by such physician, giving his and applicant's place of residence, and certifying on his honor, that he has in person carefully examined the applicant or patient, and that he finds him or her actually sick, giving the malady or disease with

which he or she is suffering, as near as he can ascertain, and that he or she is in immediate need of an alcoholic stimulant, such as prescribed; and there shall not be sold more than one quart on any one prescription, which shall be sold at one time and in one package, and delivered to the purchaser at time of sale, and that he or they shall not permit the same to be drunk on the premises where sold, nor on any other premises owned or controlled by him or them; and that he or they shall not sell more than once on the same prescription and shall not sell on any prescription bearing the same number of another prescription given by the same physician and dated during the same year; and that he or they shall not sell on a prescription bearing date more than three days prior to the date of its presentation nor upon the prescription of a physician not known to him or them to be a regular practicing physician, authorized under the laws of Texas to practice his profession, nor permit a minor to remain on his premises or his place of business, except the house or place of business of a regular pharmacist; and that he or they shall not permit any games prohibited by the laws of this State to be played, dealt, or exhibited in or about such house or place of business; and that he or they shall not rent or let any part of the house or place of business or premises in which or on which they are selling such liquors or medicated bitters, to any one, for the purpose of carrying on any business in violation of the local option laws or the penal laws of the State; and that he or they shall not adulterate the liquors or medicated bitters sold by him or them, nor knowingly sell or give away such adulterated liquors; and that he or they shall keep an open, orderly house, and shall not use any screen or other device for the purpose of or which shall obstruct the view through the door or doors opening out on the street or alley; which said bond shall be filed in the office of the county clerk of the county where such business is carried on, and recorded by him in a book to be kept for that purpose; and for recording same he shall receive a fee of 75 cents. For every breach or violation of any of the provisions of said bond, the person, firm, corporation, or association of persons, and the sureties on said bond, shall be liable in damages to any person, firm, corporation, or association of persons, injured thereby. In addition to the proceedings by parties sustaining damages by the violation, it shall be the duty of the county and district attorneys to institute suit in the name of the State of Texas for each and

every infraction or violation thereof, for the use and benefit of the county, and the sum of $250 shall be recovered for each infraction against the principal and sureties on said bond, as liquidated damages, which said sum shall be paid into the county treasury and become a part of the road fund of said county. Said bond shall not be void on the first recovery, but may be sued upon for each infraction thereof until the full penal sum named therein shall be exhausted. If said bond shall be exhausted or become in danger of being exhausted by suits, said person, firm, corporation, or association of persons, shall be required to execute another bond; notice of such requirement shall be given by the county judge of the county, and such parties shall have ten days after notice to comply and upon failure to do so shall be subject to all the pains and penalties from the time such notice was given as if no bond had been given in the first instance. Provided, that in case the county judge shall fail to give the notice herein required, then any citizen of the county, over the age of twenty-one years, may do so, and in case of failure to execute another bond within the time required, as above set forth, said person may bring suit in the district court of the county to require such person, firm, corporation, or association of persons, to execute a new bond. Provided, further, that in case the sureties on such bond shall become insolvent, or found to be insolvent after the execution of such bond, it shall be the duty of the county judge of the county to require of them a new bond, the same as above set forth, and in case of his failure to do so, any citizen, as above set forth, may proceed in the district court aforesaid to compel them to execute such bond, and in case the insolvency of said sureties or either of them is established, which shall be done under the rules of evidence governing other like cases, or in case it is shown that said bond is exhausted or in danger of being exhausted by suit, said court shall enter up its judgment requiring said parties to enter into a new bond within ten days from the date of the judgment, and adjudge the cost against defendants, and assess a reasonable attorney's fee against them as cost. In case of an appeal from such judgment the bond shall be in an amount sufficient to cover all costs and damages, to be fixed by the judge trying the cause; and in addition to the conditions now required in appeal bonds, be continued further to pay all damages occasioned by the breach or violation of the local option and penal laws of the State from the date of

the institution of the suit until the final termination of such suit. In case appellants are cast in the suit and the same is finally determined against him or them, said appeal bond may be sued upon and recoveries had the same as provided in this chapter and article for suits and recovery on the original bond. Provided, further, that when suit is instituted hereunto by a citizen, the suit shall be prosecuted without bond for cost on [or] appeal bond.

SEC. 2. The near approach of the close of the present session of the Legislature, and the crowded condition of the calendar, and the importance of the raising additional revenue for the State, and the justness of dealing with all liquor dealers alike, create an emergency and an imperative public necessity requiring the suspension of the constitutional rule requiring bills to be read on three several days, and that this act take effect and be in force from and after its passage, and it is so enacted.

AUTHORITIES.

American Sugar Refining Co. v. Louisiana, 177 U. S., 89.
Reyman Brewing Co. v. Brister, 179 U. S., 445.

ARGUMENT.

The sole basis of the charge of discrimination is Article 5060i, Revised Statutes of Texas of 1895, which is the same as Section 13a of the Acts of 1893, same being as follows:

"The provisions of this chapter shall not apply to wines produced from grapes grown in this State, while the same is in the hands of the producer or manufacturers thereof."

The counsel for plaintiffs in error take the anomalous position that this provision (assuming for the purpose of argument that it is a discrimination) would not make the statute repugnant to the Fourteenth amendment to the Constitution of the United States, as a matter of *taxation* of the liquor traffic, but does make it violative of that amendment as to the matter of *regulation* of that traffic. In other words, if the statute only provided for an occupation tax upon those engaged in the sale of spirituous, vinous and malt liquors, this provision would not be discriminatory, but as the statute which imposes the *tax* also *regulates* the occupation by requiring a bond securing the mode and manner in which it may

be conducted, there is a discrimination, which is in conflict with the amendment. We are at a loss to know by what process of reasoning they arrive at this conclusion. It is conceded that the provisions of the statute, imposing the occupation tax upon those engaged in selling spirituous, vinous and malt liquors are valid, notwithstanding the exception exempting wines made from grapes grown in Texas, while in the hands of the producer or manufacturer; but when the State, in the exercise of its police powers, undertakes to throw around a business, the pursuit of which is universally restricted, regulations to promote the peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, a provision of a statute otherwise harmless, immediately becomes repugnant to the Fourteenth Amendment to the Constitution of the United States, and deprives a citizen of the equal protection of the laws! The police power of the State is as plenary as the taxing power, and all property subject to the taxing powers is subject to the regulation of the police power. (Kidd v. Pearson, supra.) The constitutional guaranties of the Fourteenth Amendment to the Constitution of the United States, that no State shall deny to any person within its jurisdiction the equal protection of the laws, were not intended to limit the subjects upon which the police power of a State may lawfully be exerted, for these guaranties have never been construed as being incompatible with the principle, equally vital, because so essential to peace and safety, that all property is held under the implied obligation that the owner's use of it shall not be injurious to the public.

Jones v. Brim, 165 U. S., 180.
Powell v. Pennsylvania, 127 U. S., 678.

The Fourteenth Amendment is not the "scarecrow" it is often represented to be; it does not overthrow State laws, rights and remedies to the extent and purposes for which it is often cited. (Anderson v. Henry, 45 W. Va., 319.)

Chief Justice Taney long ago said, in the License Cases, 5 How., 577, that "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper."

This court held, in the case of Barbier v. Conley, 113 U. S., 27, that the Fourteenth Amendment did not have the effect to take from the States of the Union those powers that were reserved at the time the original Constitution was adopted. In this case the court used this language:

"But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of a State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity.

The case of Mugler v. Kansas, 123 U. S., 623, is an elaborate discussion of the extent of the police power of the State in the regulation of the sale of intoxicating liquors. The general question in the case was, whether the statutes of Kansas were in conflict with that clause of the Fourteenth Amendment which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.

In passing upon the extent of the police power of a State in regard to the regulation of the liquor traffic, the court held that there was no justification for holding that a State under the guise of police regulations was aiming to deprive a citizen of his constitutional rights. Neither could it be said that a State government interferes with or imposes upon anyone's constitutional rights when it determines that the manufacture or sale of intoxicating drinks, for general or individual use, constitute a business in which no one may lawfully engage, and it could not be supposed that the States intended by adopting the Fourteenth Amendment to impose restraints upon the exercise of their powers for the protection of the safety, health and morals of the community.

In the case of the American Sugar Refining Company v Louisiana, supra, a State statute was involved imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses. The statute exempted from the tax "planters and farmers grinding and refining their own sugar and molasses." It was contended that the exemption made the Act invalid because it denied the equal protection of the laws guar-

anteed under the Fourteenth Amendment to the Constitution of the United States.

The court held that the Act was not invalid, and that the State might, if it chose, exempt certain classes of property from taxation altogether, and might impose a different tax upon different trades and professions, and vary the rates of excises upon various products, and that all such regulations, so long as they proceed within the reasonable limits of general usage, are within the discretion of the State Legislature or the people of the State in framing their Constitution.

This case was followed by the Supreme Court of this State in the case of Douthit v. State, 83 S. W., 795.

In the case of Reyman Brewery Company v. Brister, 179 U. S., 451, there was involved a tax upon the business of trafficking in spirituous, vinous, malt or any intoxicating liquors.

In defining the phrase "trafficking in intoxicating liquors," it was provided in the statute that it did not include the manufacture of intoxicating liquors from the raw material and the sale thereof at the manufactory. It was contended that this provision of the law was a discrimination between foreign and domestic dealers in intoxicating liquors. The court in passing upon the question held that it was not a discrimination, and used this language:

"In exempting sales in quantities exceeding one gallon at the place of manufacture, and in imposing the tax upon such sales, when made at places elsewhere, the Legislature of Ohio was, in the exercise of its police power, aiming to restrict the evils of saloons or places where liquors are drunk. By imposing the tax upon the latter, the law, to some extent, is calculated to lessen an acknowledged source of vice and disorder."

The court affirmed the decision of the Supreme Court of Ohio and quoted approvingly the following from the case of Adler v. Whitbeck, 44 Ohio State, 539:

"It was for the Legislature to determine the forms of the traffic that required to be regulated as a source of evil. It has, in a measure, drawn a line between a distillery and brewery, on the one hand, and a saloon on the other. There is nothing unreal in the distinction. It is known by all men, and, in one respect, probably too well by many men, and, unless absolute prohibition is resorted to, no more practical distinction could be made."

A discrimination is not invalid, even under the taxing power of

the State, unless it is arbitrary, oppressive or capricious, and a statute which contains a discrimination founded upon a reasonable distinction in principle will be upheld.

If a State, within the limits of a reasonable distinction in principle, can discriminate in the matter of taxation, equally so can a discrimination, so based, be made in the matter of selecting occupations to be placed under the visitation of its power to protect the peace, morals, and good order of her people.

There can be no controversy as to the existence of a reasonable distinction in principle, between the occupation of a man who cultivates and produces the grapes out of which he manufactures the wine, and that of a man who sets up a dramshop, buying and selling wines and other intoxicants out of which he can make the better profit. The one is engaged in promoting the industries of the State. His right to sell is clearly an incident to his right to produce and manufacture. (American Sugar Refining Co. v. Louisiana, *supra.*) The other is engaged in a business universally recognized to be detrimental to the peace, morals, and good order of society, and uniformly subjected to stringent police supervision.

The man in the "homespun" shirt, enduring the cold of winter during the season of pruning, and the scorching heat of a Texas summer sun during the season of gathering and treading "his wine press alone" during the season of manufacturing, is not engaged in the same business under like conditions as the "man of the white apron," who prescribes "Parker's Rye" for the winter's cold, and that which "made Milwaukee famous," for the summer's heat, and whose season of "treading the wine press" is spent around the domino table, with those who "pay the freight."

The "gilded hell" painted by counsel for plaintiff in error, presided over by his "Satanic Majesty," the producer of Texas grapes and manufacturer of Texas wine, would be hot, indeed, did not our penal statutes deprive it of "brimstone." Under Article 100, Penal Code, he can not sell or give, or cause to be sold or given, any vinous liquors to any person under the age of twenty-one years. He can not permit games prohibited by law to be played in his house. (Art. 389, Penal Code.) He can not rent his house or any portion thereof to a gambler. (Art. 390, Penal Code.) If he has a pool or billiard room he can not allow a minor to enter it. (Art. 382a, Penal Code.) In fact he is encompassed by every provision of the Penal Code which surrounds the

dealer in other intoxicating liquors. There are only two exemptions in favor of the man who sells wine which he manufactures from grapes grown in Texas:

First. Exemption from the payment of an occupation tax as a liquor dealer, which is conceded to be valid.

Second. Exemption from giving a bond as a liquor dealer, which is contended to be invalid.

3.

THE PLAINTIFFS IN ERROR NOT BEING ENGAGED IN THE SALE OF WINES EXCLUSIVELY, BUT BEING ALSO ENGAGED IN THE SALE OF OTHER INTOXICATING LIQUORS THAN WINES, CAN NOT CHALLENGE THE VALIDITY OF THE TEXAS STATUTES.

STATEMENT.

Plaintiff in error P. O. Cox made application for license to sell "spirituous, vinous, or malt liquors or medicated bitters." (Tr., p. 8.) His bond is an obligation relating to the conduct of "house or place for the sale of spirituous, vinous, or malt liquors or medicated bitters capable of producing intoxicating liquors." (Tr., p. 9.) He engaged in the sale of whisky and beer. (Testimony of W. W. Thompson, Tr., pp. 13-20.)

AUTHORITIES.

Tiernan v. Rinker, 102 U. S., 123.
Powell v. State, 69 Ala., 13.
McCreary v. State, 73 Ala., 482.
Bogan v. State, 84 Ala., 150.

ARGUMENT.

In the case of Tiernan v. Rinker, *supra*, there was involved the construction of an Act of the Legislature of Texas, approved June 3, 1873, which levied an occupation tax upon all persons "pursuing the occupation of selling spirituous, vinous, malt and other intoxicating liquors." The Act contained the following proviso: "Provided, that this section shall not be construed as to include

any wines or beer manufactured in this State, or when sold by druggists for medicinal purposes."

The facts developed that plaintiffs in error in that case were not engaged in the *exclusive* sale of *wines and beer*, but were also dealers in other intoxicating liquors. The case involved the validity of the tax.

This court said: "If a party be engaged exclusively in the sale of these liquors [wines and beer] or in any business for which a tax is levied because it embraces the sale of them, he may justly object to the discriminating character of the act, and on that account challenge its validity; * * * but if engaged in the sale of other liquors than beer and wines, he can not complain of the State tax on that ground."

The record in this case showing that plaintiff in error P. O. Cox was engaged in the sale of *spirituous and malt liquors*, (Tr. pp. 13 to 20), and was not engaged in the sale of *wines exclusively*, he cannot challenge the validity of the statute.

We respectfully submit that the judgment should be affirmed.

Charles K. Bell

R. V. Davidson Atty. Gen'l of Tex.

Lecande Record Asst. " " " "

For Defendant in Error, the State of Texas.

Supreme Court of the United States.

Nos. 266 and 267.—October Term, 1905.

266.	P. O. Cox, Sam Levy, and W. M. Evans, Plaintiffs in Error, *vs.* The State of Texas.	In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.
267.	P. O. Cox, Sam Levy, and W. M. Evans, Plaintiffs in Error, *vs.* W. B. Thompson.	

[May 21, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

These are two suits upon a statutory bond executed by the plaintiffs in error as principal and sureties. There were verdicts and judgments against the plaintiffs in error, whereupon motions were made for new trials, setting up that the act under which the bond was given was contrary to the Fourteenth Amendment of the Constitution of the United States as denying to persons within the jurisdiction the equal protection of the law. The motions were overruled, and an appeal was taken to the Court of Civil Appeals. That Court affirmed the judgments below, 85 S. W. Rep. 1199; id. 34, a motion for a rehearing was overruled, an application for a writ of error was refused by the Supreme Court of the State, and thereupon the cases were taken to this Court.

The bond in suit was given by a liquor seller and was conditioned, among other things, against selling intoxicating liquors to minors, or allowing minors to enter and remain in the obligor's place of business. The breaches found were breaches of the conditions recited. These suits were brought by the defendants in error respectively, the State of Texas, and the parent of the minor. They seem to have been tried together, and the records are so similar that they properly have been treated by counsel as one.

The Statutes of Texas provide for taxes on sellers of spirituous, vinous or malt liquors, or medicated bitters. Rev. Civil Sts. 1895, Arts. 5060*a*, 5060*b*. They require an application for a license, giving details, a payment of the annual tax as a condition of obtaining the same, and the giving of a bond like the one in suit. Arts. 5060*c*–5060*g*. See amendments, St. 1897, c. 158; 1901, c. 136. They also enact, however, that "the provisions

of this chapter shall not apply to wines produced from grapes grown in this state, while the same is in the hands of the producers or manufacturers thereof." Art. 5060*i*. This article is thought to invalidate those which precede. The matters of discrimination relied upon are the tax and the requirement of the bond. It may be proper to add that there was a demurrer, setting up generally that the statute was unconstitutional because of this article, but until the motion for a new trial was made there was no sufficient setting up of a defence under the Constitution of the United States. *Kipley* v. *Illinois*, 170 U. S. 182. *Layton* v. *Missouri*, 187 U. S. 356.

The main argument addressed to us was rested on the notion that the statutes discriminate unconstitutionally between two classes of persons in the State, naturally existing there, as in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, there was a discrimination with regard to trusts in favor of producers and raisers of agricultural products and live stocks. This argument seems to us a fallacy. Farmers and stock raisers are classes naturally existing in the community, carrying on distinct callings and not likely to be engaged in anything else. Hence, although farmers and stock raisers equally with others were prohibited from forming trusts for other purposes, to permit them to form trusts in their regular business was practically and in fact to discriminate between two classes and others. The case was discussed throughout on the footing of classification. But, so far as we know, there is no natural distinction of classes among liquor sellers—one class selling their own domestic wines alone, another selling all intoxicants except domestic wines. The statutes regulate the doing of certain things, which presumably all liquor sellers would prefer to be free to do. Therefore whatever other objections there may be to them they do not deny the equal protection of the laws by forbidding without justification to one what they permit to another class.

There is one slight qualification necessary to what we have said. It is true that there is granted to the producers and manufacturers of wine from grapes grown in Texas an immunity in respect of that wine which is not granted to other sellers of the same wine. To that extent, but to that extent alone, favor is shown to a class. But this is not the class discrimination put forward and insisted upon. The attack is not mainly on the distinction between producers and other sellers of domestic wine, but upon that between those producers and the sellers of other wine. The latter, as we have said, is not a true class distinction. Whether there is a difference in the scope of a State's general power to legislate and its power to tax or not, (*Kidd* v. *Pearson*, 128 U. S. 1, 26, *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562, 563,) the former does not need an extended defence so far as the Fourteenth Amendment alone is concerned. See *American Sugar*

Refining Co. v. *Louisiana*, 179 U. S. 89; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445; *St. John* v. *New York*, 201 U. S. 633.

That part of the Fourteenth Amendment which forbids the abridgement of the privileges or immunities of citizens of the United States was not referred to or relied upon in the motion for a new trial or in the assignment of errors before the Court of Civil Appeals. It is mentioned for the first time in the assignment of errors before this Court. *Chicago, Indianapolis & Louisville Ry. Co.* v. *McGuire*, 196 U. S. 128, 132. In view of the decisions we hardly suppose that the omission was by mistake. *Bartemeyer* v. *Iowa*, 18 Wall. 129. *Crowley* v. *Christensen*, 137 U. S. 86. *Giozza* v. *Tiernan*, 148 U. S. 657. *Cronin* v. *Adams*, 192 U. S. 108. The truth is that the Fourteenth Amendment does not touch the case, standing alone, and, if so, other provisions of the Constitution which were not invoked cannot be brought in now under cover of the reference to the Fourteenth Amendment to give the latter a more extensive application to the case than it would have when taken by itself. If the States were restricted by the Fourteenth Amendment only, and saw fit to encourage domestic production, or thought to promote temperance, or to help to secure pure wine, by statutes such as those before us, there would be nothing to hinder them. If the statutes are open to objection as improperly interfering with commerce among the States, *Tiernan* v. *Rinker*, 102 U. S. 123, *Walling* v. *Michigan*, 116 U. S. 446, the right which springs from Art. 1, § 8, of the Constitution cannot be used to enlarge for the purposes of this case the privileges and immunities or the equal protection of the laws secured by the Fourteenth Amendment. *Dewey* v. *Des Moines*, 173 U. S. 193, 198. The converse case of a right set up under Art. 1, § 8, and an attempt to support it by the Fourteenth Amendment, was decided in *Keokuk and Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633. See further *Harding* v. *Illinois*, 196 U. S. 78, 86.

It is proper to say that Art. 1, § 8, is referred to in the assignments of error before the Court of Civil Appeals and before this Court. But it does not appear that the Court of Civil Appeals dealt with the point and probably it refused to do so on the ground that the section was not relied upon before the trial Court. We cannot say that it erred, even if it did, unless that ground is excluded. *Jacobi* v. *Alabama*, 187 U. S. 133. *Erie Railroad* v. *Purdy*, 185 U. S. 148. The case was argued before us on the Fourteenth Amendment alone, and although there is some slight reference to interference with commerce in one of the briefs, it is rather in aid of the argument based on *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, than as an independent point. At all events the question is not open here.

We believe that we have said enough to dispose of the cases. Whether, even if the statute is invalid as to wines made in other States, the bond may

be valid, in view of the applications having extended to the sale of spirituous liquors, *Tiernan* v. *Rinker*, 102 U. S. 123, or otherwise, it is unnecessary to inquire.

Judgments affirmed.

Mr. Justice HARLAN, dissenting.

I do not understand that the court modifies the principles announced in *Walling* v. *Michigan*, 116 *U. S.* 446, or in *Connolly* v. *Union Sewer Pipe Co.*, 184 *U. S.* 540. In my judgment, those cases are applicable to and control this case, and require a reversal of the judgment below upon the ground that the statute of Texas is in violation of the Constitution of the United States. I therefore dissent from the opinion and judgment of the court.

Mr. Justice BREWER and Mr. Justice BROWN concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.